

DEPARTMENT OF COMMERCE

COURT OF THE UNITED STATES

RECEIVED FEBRU 1907

No. 555.

THE PRIMA COMPANY, PETITIONER.

THE PRIMA COMPANY, LTD. OWNER OF THE
PRIMA COMPANY, LIMITED, AND HUGH HODGKIN &

THE PRIMA COMPANY, LIMITED, OWNER OF THE
PRIMA COMPANY, LIMITED, AND HUGH HODGKIN &

(17,212)

(27,912)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 555.

THE TEXAS COMPANY, PETITIONER,

VS.

HOGARTH SHIPPING COMPANY, LTD., OWNER OF THE
STEAMSHIP BARON OGILVY, AND HUGH HOGARTH &

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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THE NEW YORK PUBLIC LIBRARY

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING CO., LTD.,
owner of the Steamship *Baron*
Ogilvy, and HUGH HOGARTH &
SONS,

Respondents.

Statement.

1915

Sept. 22—Libel filed.

1916

Jan. 13—Answer, with interrogatories, of Hogarth Shipping Company, Ltd., filed.

Jan. 17—Answer, with interrogatories, of Hugh Hogarth & Sons filed.

Jan. 29—Bond on attachment filed.

1919

Jan. 3—Cause tried before Hon. Charles M. Hough, J. J.

Counsel for the British Embassy in the United States permitted to intervene at the trial as *amici curiae* and file Suggestion and Certificate.

Interrogatories annexed to answer answered orally at the trial.

Feb. 4—Opinion dismissing libel filed.

Feb. 21—Final decree entered.

July 11—Notice of appeal (libelant's) filed.

July 11—Assignment of errors filed.

Libel.

*To the Honorable the Judges of the United States
District Court for the Southern District of New
York :*

The libel of the Texas Company, a corporation, against Hogarth Shipping Company, Ltd., a corporation, and Hugh Hogarth & Sons, a co-partnership, in a cause of contract civil and maritime, alleges as follows:

5 FIRST: At all times herein mentioned the libelant was and still is a corporation organized and existing under the laws of the State of Texas, and having its principal office at 17 Battery Place, Borough of Manhattan, City of New York.

SECOND: On information and belief, at all said times the respondent Hogarth Shipping Company, Ltd., was and still is a corporation, organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal office and place of business in said Kingdom and having no office or place of business in this District or in the United States, and at all said times the respondents Hugh Hogarth & Sons, were and still are co-partners, having their principal office and place of business at Glasgow, Scotland, and having no office or place of business in this District or in the United States; and at all said times the respondents have been and still are the owners of the Steamships *Baron Ogilvy* and *Baron Cawdor*.

THIRD: On or about February 6, 1915, at New York, a certain charter party in writing was entered into between the libelant and the respondents whereby the respondents agreed, on certain terms and conditions, to charter to the libelant a steamship to be declared on or before March 15, 1915,

for a voyage from Port Arthur, Texas, to South African ports as therein specified, with a full cargo of refined petroleum in cases, to be furnished by the libelant, steamer to load between April 15th and May 15th, 1915; and the libelant agreed to pay for the carriage and delivery of said cargo the sum of 47c for each case delivered, if the vessel should discharge at one port only, and to pay certain additional freight in case of discharge at more than one port. The steamship *Baron Ogilvy* was, on or about March 11th, 1915, named by the respondents for the performance of the said charter party.

FOURTH: The respondents have nevertheless wholly failed and refused to send said steamship or any steamship to Port Arthur or to tender any steamship for the carriage of said cargo, and have, on the contrary, refused to do so, and have never carried nor offered to carry said cargo or any part thereof, but have repudiated their obligations under said charter party.

FIFTH: The libelant has duly performed all the conditions of said charter party on its part to be performed.

SIXTH: By reason of the premises the libelant was obliged to secure other tonnage to carry said cargo, which it did at the best rate obtainable, but was obliged to pay a much larger sum as freight for the carriage of said cargo than that fixed in the said charter party. By reason of the premises the libelant has sustained damage in the sum of approximately \$50,000, no part of which has been paid, although duly demanded.

SEVENTH: On information and belief, the respondents cannot be found within this District, but

they have within this District goods and chattels, to wit, the Steamship *Baron Caudor*, her engines, boilers, etc.

EIGHTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

- WHEREFORE, the libelant prays that process in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said respondents, Hogarth Shipping Company, Ltd., and
- 11 Hugh Hogarth & Sons, and that said respondents, and each of them, may be cited to appear and answer on oath the matters aforesaid; and that, if said respondents cannot be found, then their goods and chattels, to wit, the Steamship *Baron Caudor*, her engines, boilers, etc., be attached to answer the libelant's demand, and that the libelant have a decree for the amount of damages sustained by it as aforesaid, together with interest and costs, and such other and further relief as may be just.

HAIGHT, SANDFORD & SMITH,

Proctors for Libelant,

27 William Street,

New York City.

SOUTHERN DISTRICT OF NEW YORK, SS.:

W. A. THOMPSON, JR., being duly sworn, deposes and says:

I am Vice-President of the Texas Company, the libelant herein. I have read the foregoing libel and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The reason why this verification is not made by the libelant is that it is a corporation and incapable of making the same.

The sources of my information and the grounds of my belief as to the matters stated on information and belief are my possession of a copy of the charter party and my familiarity with the affairs of the libelant as its Vice-President, and also letters written to me by Messrs. J. H. Winchester & Company, who acted as agent for the respondent herein.

W. A. THOMPSON, JR.

Sworn to before me this

18th day of September, 1915.

GUY STEVENS,

Notary Public No. 3593,

(SEAL) New York Co.

Endorsed: Libel, Filed Sept. 22, 1915.

16 **Answer of Hogarth Shipping Company,
Ltd.**

To the Honorable Judges of the United States District Court for the Southern District of New York:

The separate answer of Hogarth Shipping Company, Ltd., a corporation, one of the respondents herein, to the libel of The Texas Company, in a cause of contract, civil and maritime, alleges, on information and belief, as follows:

17 **FIRST:** It denies that it has any knowledge or any information sufficient to form a belief as to the matters alleged in the first article of the libel.

SECOND: It admits the matters alleged with regard to it in the second article of the libel, and that at the times mentioned in the libel it was, and is now, the owner of the steamships *Baron Ogilvy* and *Baron Cawdor*.

It alleges that Hugh Hogarth & Sons are a co-partnership, which has its principal office at Glasgow, Scotland, has not any office in this District or in the United States, but it denies that said co-partnership was, or has been, the owner of the steamships *Baron Ogilvy* and *Baron Cawdor*.

18 **THIRD:** It admits that on or about the 6th day of February, 1915, at New York, a charter-party in writing was entered into between the libelant and the respondent, containing certain terms and conditions, and that the steamship *Baron Ogilvy* was, on or about March 11, 1915, named by the respondent under said charter-party, and accepted by the libelant, as the vessel by which said charter-party was to be performed. It denies that the terms and conditions of the charter-party are fully or correctly set forth in the third article of the libel, and,

for greater certainty, demands the production of the original charter-party on the trial hereof.

FOURTH: It admits that it has been prevented by the requisitioning of the steamship *Baron Ogilvy* by the Government of the Kingdom of Great Britain and Ireland, as hereinafter set forth, from placing the said steamship at the disposal of the libellant under the said charter-party, or carrying or offering to carry the cargo mentioned in the charter-party.

It denies the other matters alleged in the fourth article of the libel.

20

FIFTH: It denies that it has any knowledge or any information sufficient to form a belief as to the matters alleged in the fifth article of the libel.

SIXTH: It denies that it has any knowledge or any information sufficient to form a belief as to the matters alleged in the sixth article of the libel.

SEVENTH: It admits that at the time of the filing of the libel herein, it was not within this District, but it had within the District its steamship *Baron Caudor*.

EIGHTH: It admits that the premises of the libel are within the jurisdiction of this Court, but it prays, for reasons hereinafter stated, that the Court refuse to take jurisdiction of the matter. It denies all the other matters alleged in the eighth article of the libel.

21

NINTH: Further answering, and as a further separate defence herein, and re-alleging the matters hereinabove set forth, as if they were herein again

22 *Answer of Hogarth Shipping Company, Ltd.*

fully pleaded, the respondent, Hogarth Shipping Company, Ltd., alleges that:

I. It is a corporation existing under the laws of the Kingdom of Great Britain and Ireland and a subject of said Kingdom, and that the steamship *Baron Ogilvy* is a British vessel sailing under the British flag and subject to the prerogatives of the British Crown and the orders and requirements of the British Government.

II. The charter-party referred to in the libel contains the following special clauses:

23

“Voyage Charter—Special Clause.

“It is a condition of this charter and the charterers undertake that:—

“(1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.

“(2) The ship shall not be used nor be documented in any such way nor shall she carry any such cargo or any cargo so documented as would expose her to seizure or condemnation by Great Britain or any of her Allies.

24

“(3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association in which the ship is entered. The warranties now contained in such policies are as follows:

“(a) That the ship shall comply, so far as possible, with the orders of His Majesty’s

Government and the directions of the Committee as to routes, ports of call and stoppages.

“(b) That the ship shall not start on the voyages if ordered by His Majesty’s Government not to do so.

“(c) That the ship shall leave an enemy’s port within the days of grace allowed by the enemy and shall comply with the terms of any pass granted by the enemy.

“(d) That the ship shall not enter or leave, or attempt to enter or leave, any port which is known to be blockaded by the enemy.

26

“Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.”

“All Bills of Lading given for cargo shipped under this charter party the charterers undertake and agree shall contain the following clause:

“‘The ship in addition to any liberties expressed or implied herein shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages or otherwise howsoever given by His Majesty’s Government, or any Department thereof, or any person acting or purporting to act with the authority of His Majesty or of His Majesty’s Government or of any Department thereof, or by any committee or person

27

having under the terms of the War Risks Insurance on the ship the right to give such orders or directions, and nothing done or not done by reason of such orders or directions shall be deemed a deviation.'

"Should charterers fail to insert said clause Master shall have the right to refuse to sign such Bills of Lading."

29

III. On February 6, 1915, the date when the charter-party which is the subject matter of this suit was made, as the libellant then well knew, and at all the other times mentioned in the libel and in this answer, a state of war existed and has since continued and still exists between the Kingdom of Great Britain and Ireland and its Allies on the one side and the Empires of Germany and Austro-Hungary and their Allies on the other side.

30

IV. On April 10, 1915, whilst lying in the port of London, England, the steamship *Baron Ogilvy* was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service, under and pursuant to the general prerogative of the British Crown and in pursuance of the Royal Proclamation dated August 4, 1914, a copy of which is hereto annexed, marked Schedule "A" and hereby made a part of this answer.

Pursuant to said requisition the steamship *Baron Ogilvy* was operated by and under the orders and directions of the British Government from April 10, 1915, the date of the requisition aforesaid, until after the filing of the libel herein.

The action of the British Government in requisitioning the steamer was the act of the respondent's sovereign, and the respondent and the steamship *Baron Ogilvy* were obliged to comply therewith, and to obey said requisition.

This action on the part of the British Government constituted a restraint of princes, rulers and people and a prohibition by the Government of the Kingdom of Great Britain and Ireland against the operation and proceeding of the vessel under the charter-party mentioned in the libel, and by reason of said action of the British Government the said charter-party became impossible of performance, both in law and in fact.

Notice of the fact that the steamship *Baron Ogilvy* had been requisitioned was given at once to The Texas Company through the respondent's representatives at New York.

32

By reason of the premises the respondent and the steamship *Baron Ogilvy*, on April 10, 1915, and at all times previously to the filing of the libel herein, were prevented from placing the steamship *Baron Ogilvy* at the disposal of the libelant under the said charter-party and were excused from further performance of the said charter-party.

Moreover, by the terms of the *Defence of the Realm Amendment Act Number 2 of 1915, passed March 16, 1915*, by the British Parliament, 5 Geo. V, Chap. 37, it is provided as follows:

"It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made hereunder that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the Contract so far as it is due to that interference."

33

34 *Answer of Hogarth Shipping Company, Ltd.*

The fulfilment by the steamship *Baron Ogilvy* and her owner, the Hogarth Shipping Company, Ltd., of the charter-party above mentioned, has been interfered with and prevented by the necessity on the part of the said steamship and her owner of complying with the requirements, regulations and restrictions of the Government of the United Kingdom of Great Britain and Ireland.

V. The respondent and the steamship *Baron Ogilvy* have performed all the duties and obligations laid on them by the charter-party aforesaid.

35 VI. By reason of the premises, the respondent is not liable to the libelant for damages, or otherwise, herein.

36 TENTH: Further answering, and as a further and separate defence herein, and realleging the matters hereinabove set forth, as if they were herein again fully pleaded, the respondent prays that this Court refuse to take jurisdiction of this action on the ground that it involves the relationship between the owner of a British steamship and the British Government, and the determination by this Court of the effect of acts of the British Government occurring outside of the United States; and is in effect an attempt on the part of the libelant to hold the respondent liable for acts done by said Government. Therefore, the matter is not appropriately justiciable in this Court, and this Court should decline to take jurisdiction in the premises.

WHEREFORE, the respondent prays that the libel herein may be dismissed with costs to the respondent as against the libelant, and that the libelant

Answer of Hogarth Shipping Company, Ltd.

37

will be required to answer in writing and under oath the interrogatories hereto annexed, and that the Court grant to the respondent such other or further relief as the justice of the cause may require.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Repondent,
Hogarth Shipping Company, Ltd.,
Office and Post-Office Address:
27 William Street,
Borough of Manhattan,
New York, N. Y.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, proctors for the respondent, Hogarth Shipping Company, Ltd., herein.

The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The sources of my information and the reasons for my belief as to the matters not within my own knowledge are communications received from the respondent.

39

The reason this verification is not made by the respondent is that it is a foreign corporation and none of its officers is within the United States.

JOHN M. WOOLSEY.

Sworn to before me this

13th day of January, 1916.

CLETUS KEATING,

Notary Public.

(Seal) New York County.

SCHEDULE "A."

BY THE KING.

A PROCLAMATION

FOR AUTHORIZING THE LORDS COMMISSIONERS OF THE ADMIRALTY TO REQUISITION ANY BRITISH SHIP OR BRITISH VESSEL WITHIN THE BRITISH ISLES OR THE WATERS ADJACENT THERETO.

GEORGE, R. I.:

41 WHEREAS a national emergency exists rendering it necessary to take steps for preserving and defending national interests:

AND WHEREAS the measures approved to be taken require the immediate employment of a large number of vessels for use as Transports and as Auxiliaries for the convenience of the Fleet and for other similar services, but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon:

42 NOW, THEREFORE, We authorize and empower the Lords Commissioners of the Admiralty by Warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such period of time as may be necessary, on condition that the Owners of all ships and vessels so requisitioned shall receive payment for their use, and for services ren-

dered during their employment in the Government service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the Owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose.

Given at Our Court at Buckingham Palace this Third day of August, in the year of our Lord one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

God Save the King.

INTERROGATORIES ADDRESSED TO THE LIBELANT UNDER AND IN PURSUANCE OF THE RULES OF THE UNITED STATES SUPREME COURT AND OF THIS COURT TO BE ANSWERED BY THE LIBELANT OR ONE OF ITS OFFICERS IN WRITING AND UNDER OATH:

First Interrogatory: a. On what date and by whom were you first notified of the requisition by the British Government of the steamship *Baron Ogilvy*? b. Was the notification in writing? If so, please produce the notification and annex it to your answer to this interrogatory.

Second Interrogatory: a. Referring to Article 6 of the libel, did you secure any other tonnage to carry the cargo mentioned in the libel? b. If yea, please state on what date you contracted for such other tonnage, and if the contract or charter-party was in writing, please produce a certified

46 *Answer of Hogarth Shipping Company, Ltd.*

copy of it and annex it to your answer to this interrogatory.

Third Interrogatory: a. Is it not a fact that The Texas Company at all the times mentioned in the libel had, and since has had, an office and agent in London, England? b. Is it not a fact that this office of The Texas Company was in the Billiter Buildings, 22 Billiter Street, London, E. C., England? c. If it was not at the address given, where was it? d. Since what date has The Texas Company maintained its London office?

47 Fourth Interrogatory: Is it not a fact that on February 6, 1915, at the time when the charter-party was made, The Texas Company knew that a state of war existed between the Kingdom of Great Britain and Ireland and its Allies on the one side and the Empires of Germany and Austro-Hungary and their Allies on the other side?

KIRLIN, WOOLSEY & HICKOX,
Proctors for Respondent,
Hogarth Shipping Company, Ltd.,
Office and Post-Office Address:
27 William Street,
Borough of Manhattan,
New York, N. Y.

48 Endorsed: Answer and Interrogatories. Filed
Jan. 13, 1916.

Answer of Hugh Hogarth & Sons.

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To the Honorable Judges of the United States District Court for the Southern District of New York:

The separate answer of Hugh Hogarth & Sons, a co-partnership, one of the respondents herein, to the libel of The Texas Company, in a cause of contract, civil and maritime, against the Hogarth Shipping Company, Ltd., and Hugh Hogarth & Sons, alleges, on information and belief, as follows:

FIRST: They deny that they have any knowledge or any information sufficient to form a belief as to the matters alleged in the first article of the libel. 50

SECOND: They admit that Hugh Hogarth & Sons are a co-partnership with their principal office and place of business at Glasgow, Scotland, and without any place of business in this District or in the United States, but they deny that said co-partnership is now, or was at the times mentioned in the libel, or has been the owners of the steamships *Baron Ogilvy* and *Baron Cawdor*.

They admit that the Hogarth Shipping Company, Ltd., at the times mentioned in the libel was, and now is, the owner of the steamships *Baron Ogilvy* and *Baron Cawdor*. 51

THIRD: They admit that on or about the 6th day of February, 1915, at New York, a charter-party in writing, was entered into between the libelant and the respondent, Hogarth Shipping Company, Ltd., containing certain terms and conditions, and that the steamship *Baron Ogilvy* was, on or about March 11, 1915, named by the respondent, Hogarth Shipping Company, Ltd., under said charter-party, and accepted by the libelant, as the

vessel by which said charter-party was to be performed. They deny that the terms and conditions of the charter-party are fully or correctly set forth in the third article of the libel, and, for greater certainty, demand the production of the original charter-party on the trial hereof.

FOURTH: They admit that the Hogarth Shipping Company, Ltd., has been prevented by the requisitioning of the steamship *Baron Ogilvy* by the Government of the Kingdom of Great Britain and Ireland, as hereinafter set forth, from placing the said steamship at the disposal of the libellant under the said charter-party, or carrying or offering to carry the cargo mentioned in the charter-party.

They deny the other matters alleged in the fourth article of the libel.

FIFTH: They deny that they have any knowledge or any information sufficient to form a belief as to the matters alleged in the fifth article of the libel.

SIXTH: They deny that they have any knowledge or any information sufficient to form a belief as to the matters alleged in the sixth article of the libel.

SEVENTH: They allege that at the time of the filing of the libel herein, the respondents were not within this District and did not have any property within the District. The steamship *Baron Cawdor* then within the District was the property of the Hogarth Shipping Company, Ltd.

EIGHTH: They admit that the premises of the libel are within the jurisdiction of this Court, but

they pray, for reasons hereinafter stated, that the Court refuse to take jurisdiction of the matter. They deny all the other matters alleged in the eighth article of the libel.

NINTH: Further answering, and as a further and separate defence herein, and realleging the matters hereinabove set forth, as if they were herein again fully pleaded, the respondents, Hugh Hogarth & Sons, allege that:

I. They are a co-partnership, the members of which are all British subjects, with their principal office at Glasgow, Scotland, and that the steamship *Baron Ogilvy* is a British vessel sailing under the British flag and subject to the prerogatives of the British Crown and the orders and requirements of the British Government.

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II. The charter-party referred to in the libel contains the following special clauses:

“Voyage Charter—Special Clause.

“It is a condition of this charter and the charterers undertake that:

“(1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.

57

“(2) The ship shall not be used nor be documented in any such way nor shall she carry any such cargo or any cargo so documented as would expose her to seizure or condemnation by Great Britain or any of her Allies.

"(3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association, in which the ship is entered. The warranties now contained in such policies are as follows:

"(a) That the ship shall comply, so far as possible, with the orders of His Majesty's Government and the directions of the Committee as to routes, ports of call and stoppages.

"(b) That the ship shall not start on the voyages if ordered by His Majesty's Government not to do so.

"(c) That the ship shall leave an enemy's port within the days of grace allowed by the enemy and shall comply with the terms of any pass granted by the enemy.

"(d) That the ship shall not enter or leave, or attempt to enter or leave, any port which is known to be blockaded by the enemy.

"Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall, in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.

"All Bills of Lading given for cargo shipped under this charter-party the charterers undertake and agree shall contain the following clause:

"The ship, in addition to any liberties expressed or implied herein, shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages or otherwise howsoever given by His Majesty's Government, or any Department thereof, or any person acting or purporting to act with the authority of His Majesty or His Majesty's Government or of any Department thereof, or by any committee or person having under the terms of the War Risks Insurance on the ship the right to give such orders or directions, and nothing done or not done by reason of such orders or directions shall be deemed a deviation."

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"Should charterers fail to insert said clause Master shall have the right to refuse to sign such Bills of Lading."

III. On February 6, 1915, the date when the charter-party which is the subject matter of this suit was made, as the libelant then well knew, and at all the other times mentioned in the libel and in this answer, a state of war existed and has since continued and still exists between the Kingdom of Great Britain and Ireland and its Allies on the one side and the Empires of Germany and Austro-Hungary and their Allies on the other side.

63

IV. On April 10, 1915, whilst lying in the port of London, England, the steamship *Baron Ogilvy* was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service, under and pursuant to the general prerogative of the British Crown and in pursuance of the Royal Proclamation dated August 4, 1914, a copy of which is hereto annexed, marked Schedule "A," and hereby made a part of this answer.

Pursuant to said requisition the steamship *Baron Ogilvy* was operated by and under the orders and directions of the British Government from April 10, 1915, the date of the requisition aforesaid, until after the filing of the libel herein.

The action of the British Government in requisitioning the steamer was the act of the respondents' sovereign, and the respondents, Hogarth Shipping Co., Ltd., and Hugh Hogarth & Sons, and the steamship *Baron Ogilvy*, were obliged to comply therewith, and to obey said requisition.

This action on the part of the British Government constituted a restraint of princes, rulers and people and a prohibition by the Government of the Kingdom of Great Britain and Ireland against the operation and proceeding of the vessel under the charter-party mentioned in the libel, and by reason of said action of the British Government the said charter-party became impossible of performance, both in law and in fact.

Notice of the fact that the steamship *Baron Ogilvy* had been requisitioned was given at once to The Texas Company through the representatives of Hogarth Shipping Company, Ltd., at New York.

By reason of the premises the respondent, Hogarth Shipping Company, Ltd., and the steamship *Baron Ogilvy* on April 10, 1915, and at all the times previously to the filing of the libel herein were prevented from placing the steamship *Baron Ogilvy* at the disposal of the libelant under the said charter-party and were excused from further performance of the said charter-party.

Moreover, by the terms of the Defence of the Realm Amendment Act, Number 2, of 1915, passed March 16, 1915, by the British Parliament, 5 Geo. V, Chap. 37, it is provided as follows:

"It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, of this Act, or any regulations made hereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the Contract so far as it is due to that interference."

The fulfilment by the steamship *Baron Ogilvy*, and her owner, the Hogarth Shipping Company, Ltd., and by Hugh Hogarth & Sons of the charter-party above mentioned, has been interfered with and prevented by the necessity on the part of the said steamship and her owner of complying with the requirements, regulations and restriction of the Government of the United Kingdom of Great Britain and Ireland.

V. The respondents, Hogarth Shipping Company, Ltd., and Hugh Hogarth & Sons, and the steamship *Baron Ogilvy* have performed all the duties and obligations laid on them by the charter-party aforesaid.

VI. By reason of the premises, the respondents, Hugh Hogarth & Sons, are not liable to the libellant for damages, or otherwise, herein.

TENTH: Further answering, and as a further and separate defence herein, and realleging the matters hereinabove set forth, as if they were herein again fully pleaded, the respondents pray

that this Court refuse to take jurisdiction of this action on the ground that it involves the relationship between the owner of a British steamship and the British Government, and the determination by this Court of the effect of acts of the British Government occurring outside of the United States; and is in effect an attempt on the part of the libelant to hold the respondents liable for acts done by said Government. Therefore, the matter is not appropriately justiciable in this Court, and this Court should decline to take jurisdiction in the premises.

WHEREFORE, the respondents pray that the libel herein may be dismissed with costs to the respondents as against the libelant, and that the libelant will be required to answer in writing and under oath the interrogatories hereto annexed, and that the Court grant to the respondents such other or further relief as the justice of the cause may require.

KIRLIN, WOOLSEY & HICKOX,

Proctors for Respondents,

Hugh Hogarth & Sons,

Office and Post-Office Address:

27 William Street;

Borough of Manhattan,

New York, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, proctors for the respondents, Hugh Hegarth & Sons, herein.

The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The sources of my information and the reasons for my belief as to the matters not within my own knowledge are communications received from the respondents. 74

The reason this verification is not made by the respondents is that they are a foreign co-partnership and none of their members is within the United States.

JOHN M. WOOLSEY.

Sworn to before me this
day of January, 1916.

SCHEDULE "A."

BY THE KING.

A PROCLAMATION

FOR AUTHORIZING THE LORDS COMMISSIONERS OF THE ADMIRALTY TO REQUISITION ANY BRITISH SHIP OR BRITISH VESSEL WITHIN THE BRITISH ISLES OR THE WATERS ADJACENT THERETO.

GEORGE R. I.:

77 WHEREAS a national emergency exists rendering it necessary to take steps for preserving and defending national interests:

AND WHEREAS the measures approved to be taken require the immediate employment of a large number of vessels for use as Transports and as Auxiliaries for the convenience of the Fleet and for other similar services, but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon:

78 NOW, THEREFORE, We authorize and empower the Lords Commissioners of the Admiralty by Warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such period of time as may be necessary on condition that the Owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government

service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the Owners or, failing such agreement, by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose.

Given at our Court at Buckingham Palace this Third day of August, in the year of our Lord one thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

God Save the King.

INTERROGATORIES ADDRESSED TO THE LIBELANT UNDER AND IN PURSUANCE OF THE RULES OF THE UNITED STATES SUPREME COURT AND OF THIS COURT TO BE ANSWERED BY THE LIBELANT OR ONE OF ITS OFFICERS IN WRITING AND UNDER OATH:

First Interrogatory: a. On what date and by whom were you first notified of the requisition by the British Government of the steamship *Baron Ogilvy*? b. Was the notification in writing? If so, please produce the notification and annex it to your answer to this interrogatory.

Second Interrogatory: a. Referring to Article 6 of the libel, did you secure any other tonnage to carry the cargo mentioned in the libel? b. If yea, please state on what date you contracted for such other tonnage, and if the contract or charter-party was in writing, please produce a certified copy of it and annex it to your answer to this interrogatory.

Third Interrogatory: a. Is it not a fact that The Texas Company at all the times mentioned

in the libel had, and since has had, an office and agent in London, England? b. Is it not a fact that this office of The Texas Company was in the Billiter Buildings, 22 Billiter Street, London, E. C., England? c. If it was not at the address given, where was it? d. Since what date has The Texas Company maintained its London office?

83 Fourth Interrogatory: Is it not a fact that on February 6, 1915, at the time when the charter-party was made, The Texas Company knew that a state of war existed between the Kingdom of Great Britain and Ireland and its Allies on the one side and the Empires of Germany and Austro-Hungary and their Allies on the other side?

KIRLIN, WOOLSEY & HICKOX,
Proctors for Respondents,
Hugh Hogarth & Sons,
Office & Post-Office Address,
27 William Street,
Borough of Manhattan,
New York, N. Y.

Endorsed: Answer and Interrogatories. Filed
Jan. 17, 1916.

Minutes of Trial.

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DISTRICT COURT OF THE UNITED STATES.**SOUTHERN DISTRICT OF NEW YORK.**

THE TEXAS COMPANY, Libellant,	Before: HOUGH, J.
against	
HOGARTH SHIPPING COMPANY, LTD., and HUGH HOGARTH & SONS, Respondents.	86

New York, January 3rd, 1919,
10.30 A. M.

APPEARANCES:

MESSRS. HAIGHT, SANDFORD & SMITH, by Mr. Deming and Mr. Poor, for the libellant.

MESSRS. KIRLIN, WOOLSEY & HICKOX, by Mr. Woolsey, for the respondents.

FREDERICK R. COUDERT, Esq., and HOWARD KINGSBURY, Esq., for the British Embassy.

Mr. Kingsbury: Mr. Coudert and I appear this morning, and on behalf of the British Embassy ask leave to intervene as *amici curiae* for the British Government, and avow this requisition as a governmental action. It is the same procedure that was followed in the Claveresk case.

Mr. Deming: I would like to open the case first and then ask Mr. Kingsbury to make his motion.

The Court: I will hear the whole case.

87

Mr. Deming: Well, I may have an exception at this time?

The Court: Oh, yes.

Mr. Deming: Before stating the case, I would like to call attention to the fact that the libel reads against the Hogarth Shipping Company, Ltd., and also against Hugh Hogarth & Sons, a partnership. The answers indicate and the evidence substantiates the contention that the charter-party was actually between The Texas Company and the Hogarth Shipping Company, Ltd.; and that no action will probably lie against the partnership. The reading of the charter-party was such that at the time of the filing of the libel we could not tell.

(Opening statement by Mr. Deming.)

(Opening statement by Mr. Woolsey.)

The Court: Now, you have raised the defense of a governmental act, in its broadest way, and since that defense is put forward by the respondent, Mr. Kingsbury, why do you intervene?

Mr. Kingsbury: Because we are instructed on behalf of the British Embassy to represent to the Court that the Court should decline to take jurisdiction of a controversy which involves either the validity or effect of a strictly governmental act of the Government of Great Britain upon British subjects. The government which requisitioned the vessel comes forward to avow that as a purely governmental act, and represents to this Court that a foreign Court should not interfere to determine the legal force of that requisition, that that is a question for the British Courts and not for the American Courts. If there is any claim by the libellant against the respondent, which does not involve directly the validity or effect of the requisition, of course as to that we are not concerned; but so far as it arises purely out of the requisition.

tion, the position of the British Government is that it wishes to stand behind to that extent the parties whose property it took under governmental processes, and to suggest to this Court that if any claim arises out of that act, it should be remitted to the British Courts, and not determined by the Courts of the United States.

The Court: My very prompt reaction to that suggestion is to inquire whether The Texas Company is not an American person.

Mr. Deming: It is.

The Court: I don't see any reason why this Court or any Court sitting in the United States should abdicate or decline, or would have any right to abdicate or decline jurisdiction, properly involved *in personam*, when it is called upon to adjudicate the rights of an American person or citizen against a British person or citizen, whose person or property is found within its jurisdiction, unless the exercise of that jurisdiction interferes with the actual execution of governmental functions by the Crown, which this don't at all.

Mr. Kingsbury: One more word, a further suggestion, is that they avow the requisition so as to put the fact and the validity of it as a governmental act beyond further inquiry in this court; in several of these cases so much has been said in the course of the trials upon the validity of the requisition; and this is really the primary purpose of the suggestion, that the Court should not go behind the fact of the requisition and undertake to inquire into its validity under the law of England. There was in the Claveresk case an indication of an attack upon the validity of the requisition, and when the government that makes the requisition comes into court and avows it and stands behind it as an act of the government—that was

one of the principal questions involved in the Claveresk case heard a short time ago, before Judge Hand.

Mr. Woolsey: I have just sent for the opinion in that case.

95 The Court: Well, my inclination, in my mind, would be to say to that that I am not at all concerned with the method of exercising an undoubted governmental power. *Non constat*, but that that power may have been exercised by an executive in defiance of the municipal law of the country to which the executive belongs; but the effect upon the ability to perform of, in this instance, the Hogarth Shipping Company would be absolutely the same. It would not make any difference. It may have been a duly authorized performance by that municipality. That is for the Courts of England. But if it was a governmental act, I should suppose it was to be treated as such, although it might be subject to attack at home. I don't see how it can be attacked indirectly in a foreign jurisdiction. What have you to say to that, Mr. Poor?

96 Mr. Poor: I would simply like to suggest that, of course, if your Honor is right as regards that fact, that the British Ambassador cannot extop the Court from jurisdiction, because this is an American contract, made in the United States with an American corporation. Now, my objection really goes further than anything said so far. We object to the British Ambassador intervening in this case at all.

The Court: Well, I think that is my business, and not yours. If I, or the Court, chooses to listen to the first man that comes in off the street, what right have you to object?

Mr. Poor: Well, it seems to us that it seriously—

The Court: Litigants do not own the Court. The Court is here for the purpose of listening to anybody and everybody, that it may contribute to the proper administration of what we are pleased to call justice.

Mr. Poor: Well, it is perfectly well established in diplomatic practice that if the Ambassador wishes to deal with any governmental power or official he has to make his suggestion through the State Department, and if the Ambassador wishes to take up any question with any government official it is the correct thing for him to submit what he wishes to say to the State Department, and have the State Department, if it considers it proper, then to carry it on to the party whom the Ambassador wishes to reach. It seems to me that it is just as improper for a foreign Ambassador to directly attempt to intervene in a case before a Court, without the sanction of the Secretary of State, as it is to deal with any other department of the government, whether that department is—

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The Court: I greatly resent that. I do not agree with you at all on that suggestion. It may be that the British Ambassador, if he chooses to come into a court of the United States, or any other sovereignty, and make representations, may be violating diplomatic custom; but that this Court in any way, shape or manner depends upon any branch of the executive department of the Government of the United States, and more especially the Secretary of State, for aid, guidance, direction or order as to who it shall hear, or when, or how, I do not tolerate that suggestion at all. I am sitting here as a representative of an independent and equally historical branch of the Government of the United States, and I take no orders from the Secretary of State and no directions from him.

99

Mr. Poor: There were some other points I wanted to cover. It has been suggested, by the way, that there was merely an irregularity in the requisition. Our contention is that there was never any requisition at all; that what was done was simply the notification to this man that the government wanted his boat, and that there was a perfectly voluntary charter, perhaps, entered into. I don't know whether you would care to have me go into the facts of that now.

The Court: I think the facts will develop in the course of the argument. You may make your case, Mr. Deming.

101

Mr. Deming: If your Honor please, due to the fact that Mr. Griffin went into the government service, we evidently neglected to file answers to the interrogatories annexed to the answers. I arranged with Mr. Woolsey that with your Honor's permission I would give oral answers to them at the opening of the trial.

Mr. Woolsey: That is agreeable to me.

The Court: All right.

Mr. Deming: The answer to the first interrogatory is "April 12, 1915; by letter from J. H. Winchester & Company, as follows," and I produce a copy of that letter to be considered as annexed to the answer.

102

The Court: Let it be spread on the minutes.

"New York, April 12, 1915.

The Texas Company,

c/o Messrs. D. B. Dearborn & Co.,

8/10 Bridge Street, New York.

Gentlemen:

Baron Ogilvy.

Referring to this steamer's charter-party, dated at New York, February 6th, 1915, kindly

be advised that we are this morning in receipt of the following cable from Glasgow:

'Baron Ogilvy requisitioned.'

This means that the steamer has been commandeered by the British Admiralty and will, therefore, not be able to carry out charter-party with you.

Yours very truly,

(Sgd.) A. J. MOURIS,
Secretary."

Mr. Deming: The answer to the second interrogatory, A, is "Yes." The answer to B is "April 14, 1915," and I produce a copy of the charter-party called for, annexed to the answer. 104

The Court: Which is introduced in evidence and marked Libellant's Exhibit 1 of this date.

(Same so marked.)

Mr. Deming: The answer to the third interrogatory is "That The Texas Company has maintained an office in London since some time in October, 1911, and that under date of October 30, 1911, the representatives of The Texas Company in New York sent to London the necessary papers to qualify The Texas Company as a foreign corporation under the company's acts, but that the permanent agent at the London office has always had very limited powers so far as the transaction of business is concerned." The answer to the fourth interrogatory— 105

The Court: How about the rest of the third, Subdivision B and Subdivision C?

Mr. Deming: I regret to say that I have not that address.

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Minutes of Trial.
A. J. Mouris—For Libellant—Direct.

Mr. Woolsey: It is in London.

The Court: Then put it down in the record as to Interrogatory 3, Subdivision C, that counsel is not informed as to the exact address, that it is in London, England; and entry is made that the address suggested in the interrogatory is wrong.

Mr. Deming: The answer to the fourth interrogatory is "Yes." Mr. Woolsey admits the allegation of Article I of the libel, that The Texas Company is a corporation of the State of Texas, with its principal office and place of business in New York City. I offer in evidence certified copy of the charter-party of the *Ogilvy*.

107

Mr. Woolsey: That is satisfactory to me.

(The same was marked Libellant's Exhibit No. 2 of this date.)

Mr. Woolsey: Mr. Deming wishes to have it called to the Court's attention on the record that these certificates that are annexed, the war clause certificates, are not part of The Texas Company form, and I am willing to admit that fact, and state that it is my belief that in the case of all British vessels that the clauses which are annexed with pasters to this charter-party are required to be annexed owing to war risk insurance and the governmental rules.

108

ANTHONY J. MOURIS, called as a witness by the libellant, was first duly sworn and testified as follows:

Direct examination by Mr. Deming.

Q. You are an officer of J. H. Winchester & Company? A. I am.

Q. Who acted as agents for the owners of the Hogarth steamers? A. Yes, sir.

Q. You acted in connection with the charter of the *Ogilvy*, the Hogarth steamer? A. Yes, sir.

Q. I call your attention to the special clauses pasted to this charter and ask you at whose instance those clauses were incorporated into the charter?

Mr. Woolsey: Objected to as irrelevant and immaterial.

The Court: Overruled.

A. They were put there at the request of the owners. 110

Mr. Deming: That is all.

The Court: Were they annexed or affixed to the paper called the charter-party at the time it was signed?

The Witness: Yes, sir; they were.

The Court: Then it may be noted on the record that the fact that they were put there by or at the instance of the owners seems to me wholly immaterial.

Mr. Deming: The sole purpose is to make use of the argument that the clauses incorporated in the contract at the instance of one party are to be construed strictly against the party so incorporating them. 111

Cross-examination by Mr. Woolsey.

Q. Isn't it a fact that it was required of all British steamers that those clauses should be annexed to the charter-parties of those steamers? A. Quite true of all British steamers which were chartered after the war broke out; so these clauses were put

on even though the owners did not state that at the time of the negotiations or not; but some owners would also always stipulate that the clauses were to go on, and others would not.

Q. But in any event they had to go on? A. It was a *sine qua non* condition, and acquiesced in at that time, that this clause would go on all British ships that were chartered.

Q. So that you would have put it in even though you had not heard from the owners mentioning those clauses? A. Probably would, yes, sir.

Mr. Deming: The answer admits the ship was never tendered under the charter-party, and the libellant rests.

The Court: Now, it may be entered upon the record that by permission of the Court Messrs. Frederick R. Coudert and Howard Kingsbury are admitted as *amici curiae* to the trial, and that these papers they present are to be marked by whatever exhibit number they should have, as filed.

(Same marked Exhibit No. 1.)

Mr. Woolsey: May I proceed?

The Court: You may.

Mr. Woolsey: I offer in evidence the testimony taken in England on open commission of the following witnesses: Samuel G. Hogarth, one of the officers of the owners; Ernest Julian Foley, of the offices of Director of Transports Division of the Admiralty—I don't remember his title exactly (examining papers)—Assistant Director to His Majesty's Director of Transports; and Charles Robertson Dunlop, a British barrister, who was examined on the British law

with regard to a charter-party under circumstances such as these; in that evidence which is enclosed in this envelope (indicating) are a series of legal opinions which Mr. Dunlop referred to; also the letters and correspondence which passed between the parties, and also the object of the charter-party, and the English Defense of the Realm Act, which is pleaded in our answer as a defence.

There is evidence also on behalf of the respondent which is in that same binder, but which we do not offer, because we do not regard it as relevant in view of the act of the British Government in making this requisition.

116

For the convenience of the Court I have summarized the dates, and if the Court has no objection, I will just mention them:

The charter-party was made February 6, 1915. I think this date is admitted.

The *Baron Ogilvy*, the vessel which was called to perform this charter, was furnished on March 11, 1915. This is alleged in the libel and admitted in the answer.

The requisition was made on April 10, 1915, whilst the vessel was in London. This is shown by Mr. Hogarth's evidence and the evidence of the witness Foley, and by the certificate of the Embassy; and the requisition continued until October 20, 1915, as shown by the Embassy's certificate and by Hogarth's evidence; and she was engaged in carrying mules for the British Government during all that period.

117

Mr. Deming: May I object to the introduction of the certificate of the Embassy as evidence in this summary? Otherwise we have

no objection to it; and I take an exception to its receipt in evidence.

The Court: Very well.

Mr. Deming: In the copy of the testimony and correspondence which came to us there was no copy of the telegram referred to in the other telegrams as of April 9th, from Hogarth to Harley. I would like to inquire whether it appears in the original or not.

Mr. Woolsey: There is the original. I don't know, really.

(Papers examined by counsel.)

By consent of counsel the telegram of April 9, 1915, from Hogarth to Harley is considered as included in the correspondence taken by the commission, and is as follows:

"Ogilvy. Your wires received. We have received no intimation from admiralty. Have had some letters regarding this vessel from Hogg and Robinson, and we protested against further interference of freight and notified them steamer chartered. However, if requisition on steamer is absolute we would prefer vessel being put on mutual trade basis to the States rather than 11 shillings charter. Please endeavor renew similar all conditions similar recent conditions of other mutual ships always distinct understanding admiralty accept all responsibility steamers charter commitments."

The Court: Is that your case, Mr. Woolsey?

Mr. Woolsey: Yes, sir; that is our case. We have a deposition which seems to be on

your desk of which we have no copies. May I look at it a moment?

The Court: Yes.

Mr. Woolsey: (Examining same). I will offer that in evidence, too. It is the deposition of John Thompson, Master of the steamship *Ogilvy*, taken before D. S. Phlegar, Notary Public, and dated December 9, 1916, and consisting of twenty-one pages.

The Court: Is the case closed?

Mr. Deming: In reply the libellant offers in evidence the testimony of Sir Henry Erle Richards, contained in the depositions returned from England, and any exhibits referred to in his testimony, if there be any introduced in connection with his testimony.

122

Mr. Woolsey: I take objection to the introduction of this evidence of Sir Henry Erle Richards on the ground that inasmuch as the governmental act has been substantiated and avowed by the government, that evidence intended to be introduced in an attempt to prove the act was not a valid act, is irrelevant in a foreign court.

The Court: That is overruled; and an exception granted.

Is that all the case now?

Mr. Deming: Yes, sir.

123

Mr. Woolsey: Yes, sir.

The Court: You may proceed with the argument. I have the facts pretty clearly in my mind, I think.

(Closing arguments by counsel.)

124 **Suggestion and Certificate of the British Embassy—*Amici Curiae* Exhibit No. 1.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libellant,

against

HOGARTH SHIPPING COMPANY,
LTD., as owner of the Steam-
ship *Baron Ogilvy*, and HUGH
HOGARTH & SONS,
Respondents.

In Admiralty.

125

SUGGESTION SUBMITTED ON BEHALF OF THE BRITISH
EMBASSY.

Now come Frederic R. Coudert and Howard Thayer Kingsbury, counsel for the British Embassy in the United States of America, and pray leave of the Court to intervene in the above entitled cause as *amici curiae*, and as such *amici curiae* to present to the Court the annexed Certificate of the British Embassy and thereupon to represent to the Court on behalf of the British Em-
126 bassy as follows:

1. That the steamship *Baron Ogilvy*, on April 10th, 1915, while lying in the port of London, England, was requisitioned by the Government of the United Kingdom of Great Britain and Ireland for Government service by virtue of the prerogative of the British Crown; that the period of the said requisition was indefinite; and that from and after the date of requisition the Steamship *Baron Ogilvy*

was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915.

2. That the Steamship *Baron Ogilvy* was of British registry and belonged to a corporation created and existing under British law; that the requisition of the said Steamship was a governmental action by the Government of the United Kingdom of Great Britain and Ireland; and that neither the fact of said requisition, nor its effects, should be enquired into by this Court.

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3. That this Court should decline to adjudicate this cause upon the ground that it involves the relations between the British Government and the owners of a British Steamship and calls for a determination by this Court of the effect of governmental acts of the British Government and constitutes an attempt on the part of the Libellant to hold the respondents liable for such acts.

4. That this Court should decline to adjudicate upon any rights or claims of the Libellants as charterers of a British Steamship against the said Steamship, or the owners thereof, in so far as such rights or claims arise out of the requisition of said Steamship by the British Government.

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Dated, January 3d, 1919.

FRERERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for the British Embassy,
Amici Curiae,
No. 2 Rector Street,
New York City, N. Y.

IT IS HEREBY CERTIFIED that the British steamship *Baron Ogilvy* on April 10th, 1915, while lying in the port of London, England, was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service under the prerogative of the British Crown; that the period of said requisition was indefinite and that after it became operative as aforesaid, the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915; that said steamship was of British registry and belonged to a corporation created and existing under the laws of Great Britain and Ireland, and that the requisition of said steamship was a Governmental act by the Government of Great Britain and Ireland.

IN WITNESS WHEREOF this certificate has been issued by the British Embassy in the United States of America this fourth day of October, nineteen hundred and eighteen.

(Seal) COLVILLE BARCLAY,
H. M. Charge d'Affaires.

Depositions.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING COMPANY,
LTD., owner of the Steamship
Baron Ogilvy, and HUGH HO-
GARTH & SONS,
Respondents.

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Depositions of witnesses taken at London, Eng-
land, by Commission.

WILLIAM A. CRUMP & SON of London, Eng. (Mr.
LE QUESNE), for the libelant.

THOMAS COOPER & Co. of London, Eng. (Mr. RAE-
BURN), for the respondents.

SAMUEL CRAWFORD HOGARTH, sworn as a witness 135
on behalf of the respondents, testified as follows:

Examined by Mr. Raeburn.

Q. You are the senior member of the firm of H.
Hogarth & Sons, shipowners, carrying on business
in Glasgow, Scotland? A. Yes.

Q. Is your firm the managers of the Hogarth
Shipping Company, Limited? A. Yes.

Q. That is a limited company with its registered office where? A. 24 St. Enoch Square, Glasgow.

Q. Is that company the owner of the steamship the *Baron Ogilvy*? A. Yes.

Q. I think the company also own a considerable number of other steamers? A. Yes.

Q. Is it a large fleet? A. The company owns about twelve other steamers.

Q. Now, there is no dispute that on the 8th February, 1915, that your firm of H. Hogarth & Sons, who were agents for the Hogarth Steamship Company, Limited, the owners of the *Baron Ogilvy*, made this contract with the Texas Company? A. Yes.

Q. Will you identify a copy of this charter-party as a matter of formality?

Mr. Le Quesne. That is objected to, as it is only a copy and not the original.

By Mr. Raeburn.

Q. The original is in New York? A. The original is in New York. The business was conducted by cable. That is as far as I can recollect a true copy.

(It was put in and marked S. C. H. 1.)

Q. Under that charter-party you had to declare a steamer on or before the 15th of March, 1915, to carry a cargo of oil from Port Arthur, Texas, to a port between Cape Town and Delagoa Bay, both inclusive? A. Yes, that is right.

Q. And did you on or about the 11th March, 1915, declare the *Baron Ogilvy* to fulfil this charter-party? A. I cannot recollect the date, but we declared the *Baron Ogilvy* in due time.

Q. And at the end of March, 1915, was the *Baron Ogilvy* due to arrive in London from Baltimore

with a cargo of oats? A. At the end of March she was, yes.

Q. At that time, at the end of March, had you a number of your fleet in requisition to the Admiralty? A. I think we had eight.

Q. Out of the twelve? A. No, out of about the twenty. We own two companies. The Hogarth Steamship Company owns the bigger steamers and the Kelvin Company owns the smaller ones.

Q. You state that the Kelvin Company own the smaller steamers? A. Yes.

Q. And the Hogarth Company the large ones? A. Yes.

Q. Of which the *Baron Ogilvy* was one? A. Yes.

Q. How many of the Hogarth Steamship Company's steamers were on requisition in March, 1915? A. Six.

Q. Half the fleet? A. Practically half the fleet.

Q. And of the number owned by the Kelvin Steamship Company? A. Two, I think.

Q. When the *Baron Ogilvy* arrived in London did you send the Captain a copy of the Texas Company's charter? A. I think it was rather before he arrived. I think the letter was waiting. At all events it was on or about his arrival.

Q. Was that letter of the 25th of March, 1915? A. Yes. We wrote the Captain of the steamer on that date.

Q. Now, so far as these are copies of your letters, are they correct copies? A. Yes; made from the press copy letter book.

Q. The first is the 25th of March, 1915, addressed to Captain Thompson of the steamship *Baron Ogilvy*. You informed the Captain that his ship was declared under open charter from Port Arthur, Texas, to the Cape ports, and say that a copy of

the charter is enclosed? A. Yes, that is quite correct.

Q. Then, in that same letter you go on to say: "If you are visited by any government officials you can inform them that the vessel is chartered from the States to the Cape and if necessary exhibit the charter-party." What is that in reference to?

A. We understood at that time the government were going to requisition further boats, and we thought that if the Captain could produce the charter-party and say his vessel was arranged for otherwise the government would leave his ship alone.

143 Q. The rest of the letter speaks for itself. On the 30th March did you again write to the Captain? A. We did, yes.

Q. I think you gave him certain instructions as to his movements and so on? A. We discussed how he was to bunker and dry dock.

Q. And something as to future movements of the vessel? A. Yes.

Q. On the 31st March, did you receive a telegram signed Evenhanded? A. Yes, that is Harley & Company.

Q. Who are Messrs. Harley & Company? A. Ship brokers, in London.

144 Q. Admiralty Note "*Baron Ogilvy* in London may require requisition her please post plan say when expect discharged"? A. Yes. The original is here.

Q. Have you had dealings with Harley & Company before? A. Frequently.

Q. On whose behalf were they acting? A. Generally on behalf of the Admiralty. At that time they were doing a very large portion of the Admiralty business as they also did in the South African War.

Q. Having received that telegram on the 31st March did you on the same day reply to Messrs. Harley & Company by letter? A. This is a copy taken from our letter book.

Mr. Le Quesne: I object to this as Harley & Company were agents of the defendants and the original could have been obtained.

By Mr. Raeburn.

Q. Were Harley & Company acting as your agents? A. Not when they sent that telegram; they were quoting on behalf of the Admiralty.

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Mr. Le Quesne: I submit the original should be procured in any event.

By Mr. Raeburn.

Q. On the 1st April did you receive a letter from Messrs. Harley & Company? A. Yes, the original is here.

Q. Dealing further with the question of the taking up of the vessel by the Admiralty? A. We did.

Q. That letter speaks for itself. On the same date did you receive a letter from another firm in London, Messrs. Hogg & Robinson? A. Yes, we received it, as far as I recollect, on the 2nd April. It is dated the 1st.

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Q. Have you the original of that?

(It was here arranged between counsel and solicitors that the correspondence should be agreed put in and marked S. C. H. 2.)

Q. How did Messrs. Hogg & Robinson come into it? A. They were Admiralty agents. Their paper is headed "Admiralty Shipping Agency." They represent the Admiralty in the city for procuring

tonnage and arranging shipments of stores for the government.

Q. And their purpose was to get the vessel for the government for the purpose of carrying hay, apparently? A. Yes.

Q. On the 2nd April you replied to that letter of Messrs. Hogg & Robinson and you only have a copy here? A. Yes.

Mr. Le Quesne: I take the same objection.

By Mr. Raeburn.

149 Q. I need not take up time by reading it. On the 2nd April, did you write to Harley & Company?

Mr. Le Quesne: The same objection applies to this.

A. Yes, we wrote to them on the 2nd April.

Q. You say: "We have heard nothing from the Admiralty and it looks as if they would leave this vessel alone." That is referring to the *Baron Ogilvy*? A. Yes.

Q. On the 3rd April did Messrs. Hogg & Robinson write to you again? You have the original of that? A. Yes.

150 Q. And to it you appear to have replied on the 6th April?

Mr. Le Quesne: I take the same objection.

By Mr. Raeburn.

Q. There, for the first time, you mention the *Baron Ogilvy*? A. We received their letter of the 3rd on the 6th.

Q. You replied, saying you had no vessel of the type they required in or shortly due in this country

with the exception of the *Baron Ogilvy* that was then in Millwall dock? A. They asked us to state if we had any vessels of that type available, and replied that we had none except the *Baron Ogilvy*, which was then in Millwall dock and chartered to load in the States.

Q. That you specifically pointed out to them? A. Yes.

Q. On the 7th April, comes another letter from Messrs. Hogg & Robinson, which you received on the 8th, I suppose. Have you the original? A. Yes.

Q. In which they state the *Baron Ogilvy* is suitable for their requirements, and they ask you to keep them posted as to her position "as it is quite possible by that time that it will be found necessary to requisition her for government service for the purpose we have named," and so on? A. Yes.

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Q. On the 9th April did you write again to Messrs. Harley & Company?

Mr. Le Quesne: I take the same objection.

By Mr. Raeburn.

Q. Stating you had intimated to Messrs. Hogg & Robinson that the vessel was committed for further business and pointing out that she was fixed for oil from the States to the Cape and thereafter from New Caledonia home? A. I think there is an omission here. I think there were two telegrams received from Messrs. Harley on that date. I produce the original of one.

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Mr. Le Quesne: I object to copies.

By Mr. Raeburn.

Q. Which is the original? A. "*Baron Ogilvy*. We regret to inform you Admiralty say must requisition this steamer."

Q. On the 9th April did you receive two telegrams from Messrs. Harley & Company? A. We did.

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Q. Was the first as follows: "*Baron Ogilvy*. We regret to inform you Admiralty say must requisition this steamer for Country's need. Telegram of Requisition is being prepared and you will receive same later. Evenhanded." A. That is the telegram we got.

Q. Did you later in the day receive another telegram from Harley & Company, "*Baron Ogilvy* referring Admiralty Notice requisition we believe could induce them take her instead for three or four trips New Orleans Avonmouth or Liverpool Fourteen pounds namely Thirteen pounds ten and ten shillings gratuity shall we try do so"? A. That was the second telegram.

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Q. On the same day did you write to Messrs. Harley & Company the letter as follows: "We have received your two telegrams of this afternoon and we confirm our telegram in reply. We have intimated to Hogg & Robinson that the vessel is committed for further business, but probably the requisitioning arrangement which you refer to will be that of another department, and it will be as well to make them clear, that the vessel is fixed for oil from the States to the Cape and thereafter from New Caledonia home. Meantime, of course, we have not received a requisitioning telegram and cannot move in the matter."

Mr. Le Quesne: I object to that on the ground that it is not the original.

A. Yes.

By Mr. Raeburn.

Q. On that same day did Harley & Company write you a letter which you would receive on the 10th? A. Yes.

Q. "S/S *Baron Ogilvy*. We are sorry that we have had to advise you to day that the Admiralty inform us that they require this steamer for the needs of the country. A formal telegram of requisition is being prepared and you will receive it in due course. It is very regrettable that the Admiralty requirements are such that they must have this steamer seeing the many other boats of yours they have requisitioned but apparently the position cannot be helped. We believe you will appreciate that our Government would not needlessly disturb any steamer's commitments if they could avoid it. Yours faithfully, Harley & Co." A. Yes. 158

Q. On the same day did Messrs. Harley & Company write you again: "S/S *Baron Ogilvy*. Since writing we have your telegram and note contents. We do not know why Messrs. Hogg & Robinson should trouble you. The Department they follow is quite distinct from the Department we follow," and so on. I need not read it all. That was the 9th. Now on the 10th April did you receive a telegram from the Admiralty signed "Transports"? A. Yes, early in the morning of the 10th, I think it was despatched the previous night. 159

Q. "Hogarth Glasgow S/S *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service Transports"? A. Yes. That is the original telegram.

Q. Now you have told me that you have had a considerable number of vessels requisitioned from time to time? A. Yes.

Q. Is that the usual form in which they requisition them? A. It generally came in that way.

Mr. Le Quesne: I object to that unless the telegrams are produced.

By Mr. Raeburn.

Q. Then the last is on the same day, the 10th April. You wrote on that day to Messrs. Hogg & Robinson: "Dear Sirs s.s. *Baron Ogilvy*. We duly received your favour of the 7th instant. The information you have received respecting this vessel from the Millwall Dock Authorities is approximately correct," and so on. And then you intimate to them that you received formal notice of requisition from the Director of Transports and thought the vessel was intended for the carriage of mules? A. Yes.

Mr. Le Quesne: I object to that because we should have the original.

By Mr. Raeburn.

Q. After that were certain alterations of a minor character made on the vessel, and did she leave London for the purpose of proceeding to the States? A. Yes, under requisition.

Q. I think she left London on the 15th April. A. About that date, I cannot recollect.

Q. In what manner was she employed by the Admiralty under the requisition? A. In carrying mules from the Southern States to England.

Q. And how long did she remain under requisition continuously? A. I think, till the following November, seven months.

Q. November, 1915? A. Yes.

Q. Incidentally, do you recollect how many voyages she performed for the Admiralty during that period? A. I think four round voyages.

Q. And no voyages for you at this period? A. No.

Q. That is to say no voyages for the Hogarth Shipping Company? A. No.

Q. Suppose she had not been requisitioned and had proceeded in due course to Port Arthur, Texas, to load under the Texas Company's charter, and had loaded and proceeded to the port of discharge between Cape Town and Delagoa Bay to whatever port might have been declared, how long would that voyage have taken? A. Roughly speaking, three months.

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Q. Up to the time of discharge of the cargo in South Africa? A. Fully three months, perhaps three and a half months.

Q. The rate you were going to receive from the Texas Company is shown in the charter-party at 47 cents one port discharge? A. Yes.

Q. How would your profits under that charter have compared with the profits that you actually made if you made any while the vessel was under requisition to the Admiralty? A. The profits under the oil charter would be infinitely more than the profits under the requisition.

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Q. It is almost unnecessary, then, to ask which you would have preferred to do, perform the Texas Company's charter or the requisition of the Admiralty? A. I think the correspondence brings it out that we did everything possible to escape requisition.

Q. Was there anything you left undone that you could have done to keep your vessel off the requisition? A. No.

Q. Now, you have had considerable experience as a British ship owner: is there any means of disobeying an Admiralty requisition? A. I have never found any; and many a time I would have liked to disobey them.

Q. But you have never been daring enough to try? A. No.

Q. Now I have to put this question to you: Are all members of the firm of H. Hogarth & Sons British subjects? A. They are.

Q. Has the firm of H. Hogarth & Sons any office in the United States of America? A. No.

Q. Has the Hogarth Shipping Company, Limited, any office in the United States of America? A. No.

Cross-examination by Mr. Le Quesne.

Q. At the time of the charter was this vessel owned by the Hogarth Steamship Company? A. She was.

Q. And at the time of the requisition? A. She was.

Q. She was never owned by you? A. She was built by the Hogarth Shipping Company and never owned by anybody else.

Q. That is the correct name? A. Yes.

Q. She was never owned by Hugh Hogarth & Sons? A. Never.

Q. Then the charter-party is incorrect when it states "A first class steam vessel owned by Hugh Hogarth & Sons"?

Mr. Raeburn: I object to that, as no such point is made in the libel.

By Mr. Le Quesne.

Q. That statement in the charter-party is incorrect that the vessel to be declared under the charter-party was a first-class steam vessel owned by Hugh Hogarth & Sons? A. Hugh Hogarth & Sons own no vessels.

Q. They owned no vessel at any material time? A. At any material time they did not.

Q. In fact, they entered into this charter-party merely as agents for the Hogarth Shipping Company? A. That is right.

Q. Although I think they are not described as agents? A. These American charter-parties are all made by cable; and it is often weeks after they are made before copies come forward and an inaccuracy of that sort is of no material importance; nobody bothers about it. 170

Q. That is as may be; but I am correct in saying Hugh Hogarth & Sons, though they contracted as agents, are not described as agents? A. No.

Q. The charter was made with their authority? A. Yes.

Q. And they in their turn were acting with the authority of the Hogarth Shipping Company? A. That is correct.

Q. Will you give me the names of the members of the firm of Hugh Hogarth & Sons as it existed at the time of the charter? 171

Mr. Raeburn: I object to that as wholly immaterial.

A. Samuel Crawford Hogarth, myself, and my brother Hugh Hogarth is the junior partner.

Q. Were those the two partners at the time of the charter? A. Yes.

Q. And at the time of the alleged requisition?
A. Yes.

Q. Now, the requisition was made merely by the telegram which you received on the 10th April: "Hogarth, Glasgow, Steamship *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service Transports"? A. As far as I know, it is.

Q. I think it is usual, is it not, to receive a letter also from the Admiralty saying that the vessel had been requisitioned? A. It is usual. We have received letters three or four weeks after the telegram and after the steamer has been on service for weeks.

Q. Did you receive any such letter in the case of this steamer? A. No.

Q. And you considered that the telegram by itself was a formal requisition of this steamer? A. Undoubtedly.

Q. Was it never confirmed to you in any document from the Admiralty? A. It was confirmed in the document in which it was arranged that the steamer was to carry mules on a head basis instead of on a T. 99 form.

Q. Are those documents here? A. I think not.

Q. Will you undertake to produce them? A. Yes.

Q. Then I call for them. Did you sign T. 99?
174 A. No.

Q. Now, you have had considerable experience of the requisitioning of vessels by the Admiralty? A. Unfortunately, I have.

Q. I assume you are acquainted with the Proclamation under which that requisition is done? A. More or less.

Q. Are you aware that it authorizes the Admiralty to requisition vessels under the hand of their

Secretary or under the hand of any Flag Officer?

A. I am not.

Q. Was any such warrant issued as far as you know in this case? A. No.

Q. Did you ever require any such warrant to be issued? A. No.

Q. Why not? A. I did not know there was any necessity. I took the "Transports" telegram as authority to act.

Q. You knew that this vessel was chartered by you to the Texas Company? A. Assuredly.

Q. And it was your business as far as you could give them the user of this vessel? A. Certainly we wanted to.

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Q. If what purported to be a requisition was not a proper requisition it was your duty to hand this vessel over to the Texas Company and disregard it?

A. I am not a lawyer and I cannot tell if a telegram sent off from the Transports Department of the Admiralty is sufficient or not; but it was sufficient authority for me to act upon.

Q. It was all you acted upon? A. It was all I acted upon, yes.

Q. Now, you have a document, T. 99, showing the terms on which this vessel was to be used by the government? A. No, I cannot say I have. T. 99 form, which the government try to shove down owners' throats as the terms on which they will requisition, as far as I know, no owner has ever agreed to.

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Q. Now, you have received hire from the government in respect of this vessel? A. Quite so, yes.

Q. Was that the hire provided for by the Blue Book rates? A. No.

Q. Was it the result of a special bargain between you and the government? A. Yes.

Q. Is that special bargain contained in the letters you are going to produce? A. Yes.

Q. Have you made any claim against the government in respect of this vessel other than a claim for hire? A. No.

Q. There has been no need for any repairs or reconditioning or restoring the vessel to her original state for which you have made a claim against the government? A. No.

Q. She carried mules, you tell us? A. Yes.

Q. Were not structural alterations made for that purpose? A. Some interior fittings were put up and were removed by us.

179 Q. But you charge the government nothing for that? A. No.

Q. Did not the government undertake to indemnify you against third party claims? A. Yes.

Q. By what did they give you that undertaking? By the letters you are going to produce? A. That is so.

Q. Have you as yet made any claim against them under that clause? A. No, but we have intimated this claim.

Q. Now, have you at any time considered whether or not the prerogative of the Crown entitles the Crown to take a vessel and use her in this way?

Mr. Raeburn: I object to that question, as it is not a question for the witness, but for a lawyer.

By Mr. Le Quesne.

Q. Have you at any time considered whether or not the prerogative of the Crown entitled the Crown to take a vessel and use her in this way? A. No.

Q. You never suggested that the Crown had no power to take your vessel for such a purpose? A. I never suggested that.

Q. Did you ever suggest that the Crown, even if they had a power to take your vessel, had no power to compel you to give them the use of your crew? A. No.

Q. Now, the vessel was requisitioned by the telegram which has been put in? A. Yes.

Q. What effort did you make to induce the Admiralty not to requisition this vessel? Did you make any? A. Not except to Harley & Company, and Hogg & Robinson.

Q. The sum total of your efforts in that direction is to be found in the documents which have been put in by my learned friend Mr. Raeburn? A. That is so.

Q. You did nothing more than appears in those letters and documents? A. That is so, yes.

Q. You never tried to induce the Admiralty to accept another vessel instead of the *Baron Ogilvy*? A. We did not. We had no other vessel.

Q. But the whole of your fleet was not requisitioned? A. The unrequisitioned part was not available.

Q. Not immediately available? A. No.

Q. Some would have been available shortly after this date? A. I cannot recollect, but I do not think some would have been available for some months. We were endeavoring to keep them away from this country as much as possible to avoid requisitioning.

Q. Are you sure there were none available or which would shortly be available? A. I am not. I would need to look up my diaries and the itineraries of the different steamers; but from the correspondence, I think it is clear that no steamer was coming here but the *Baron Ogilvy*.

Q. You have not looked up your diaries before you came here to-day? A. No.

Q. It is true to say, is it not, that the requisitioning of this vessel protected the remaining steamers of your fleet? A. Unfortunately, it is not true.

Q. But you hoped it would be true at the time this vessel was requisitioned? A. I had an idea that the more vessels the Admiralty requisitioned the less likelihood there was that the balance would be requisitioned.

Q. The rates for steamers were rising steadily all this time? A. I do not recollect.

185 Q. This requisitioning took place on April 15th? A. Yes.

Q. I put it to you that a ship owner of your experience who has been so closely in touch with the chartering market in this country from the beginning of 1915 knows that the rates rose steadily?

A. Generally speaking, there was a steady rise all the year, but there may have been a period when they did not.

Q. The chances were that if the Admiralty requisitioned a steamer in April that steamer would be worth less to her owners in the market than a steamer which the Admiralty might requisition in June? A. That is quite possible.

186 Q. From that point of view it was in the owner's interest the requisition should fall upon him in April rather than in June? A. Not necessarily.

Q. It is also true that you had contracts with the Tharsis Company and the Alkali Company for the carriage of copper ore? A. Those refer to the small Spanish steamers owned by the Kelvin Company.

Q. I suppose you would be able to plead more effectively with the Admiralty for the protection of those steamers needed for the fulfillment of those contracts if seven of your steamers had al-

ready been requisitioned? A. No. I think those contracts speak for themselves. They allowed the small vessels not to be requisitioned in order to enable us to carry out these contracts.

Q. You were solicitous that these contracts with the Tharsis Company and the Alkali Company should be carried out? A. No, we did not want to carry them out, but we had to.

Q. I suggest you were solicitous of doing so and thought the requisition of this steamer would cause the steamers you wanted for the Tharsis Company and the Alkali Company to be left alone? A. No, I do not think that.

Q. Could you not have pointed out to the Admiralty that you had a considerable portion of your fleet already requisitioned and it was unfair that this further steamer should be taken in view of her commitments? A. I had been doing it for months.

Q. In what way? A. Verbally, frequently.

Q. Did you repeat those protestations when the suggestion was made that the Admiralty were going to take this steamer? A. You mean the suggestion by Hogg & Robinson?

Q. Yes. A. The correspondence speaks for itself.

Q. You have nothing to say beyond what appears on the correspondence? A. No.

Q. Now, it is true that the Admiralty had requisitioned two steamers, the *Baron Yarborough* and the *Baron Kelvin*, and that, I think, is mentioned in your letter of the 2nd April to Hogg & Robinson? A. Yes.

Q. You made special efforts to secure the release of those two vessels? A. We pointed out that it would imperil the carrying out of the Tharsis and Alkali Companies' contract, and as the government were anxious that the maximum amount of pyrites

of copper should be brought into this country they released the ships.

Q. Did you make any special efforts to release these vessels? A. Nothing further than to point out the trade the vessels were being employed on and the contracts that were running with them.

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Q. Now, I suggest that you might have taken up this matter of the *Baron Ogilvy* much more energetically if you had been really anxious to discharge this contract. Is it your statement that you could have done more than is represented by these few letters? A. Nothing more, in my opinion, would have had any effect. I had no argument with which to go to them. It was not the government interest to carry a cargo of oil, whereas it was very much to the government interest that we should go on carrying cargoes of pyrites to this country.

Q. You told us that a large proportion of your fleet had been requisitioned at this time? A. We thought it was at the time, but it has turned out not to be.

Q. Do not you think you could have written and pointed out more emphatically that the requisitioning of your steamers was out of proportion to the requisitioning of other steamers? A. We had been doing so.

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Q. Did you suggest to the Texas Company you would try to nominate another steamer for them?

Mr. Raeburn: I object to that, as it involves a question of law which the witness is not competent to answer.

A. We did not.

By Mr. Le Quesne.

Q. When was this steamer released? A. I think the middle of November, 1915.

Q. Did you then tender her to the Texas Company? A. No.

Q. Why not? A. Because I considered we had no liability to the Texas Company.

Q. Have you any account showing what profits you made whilst this steamer was employed on government service? A. No.

Q. Can you give me any idea what those profits were? A. I suppose, at that time the vessel on government service would be making about £500 per month, on requisition service. 194

Q. What do you suggest she would have made under this contract? Have you worked it out? A. I probably did at the time. I should say she would probably make about £1,500 to £2,000 per month under this contract.

Q. Can you give me any figure? A. I am only speaking very approximately. I think the vessel would have made between £1,500 and £2,000 per month carrying the oil from the time she left this country.

Q. Did you ever apply for this vessel to be released before she was released? A. No.

Q. You never sought to obtain the release of this vessel a little earlier so that she might be tendered again to the Texas Company? A. No. 195

Q. I understand from your pleadings in this action that you rely upon the clauses which were attached to the charter-party. Are you aware of the nature of your pleadings? A. I am afraid I am not.

Q. At any rate you are acquainted with the clauses that are attached to the charter-party? A. Yes.

Q. And well acquainted with both these, the one which relates to the clauses to be attached to the bill of lading and the other headed, Voyage Charter Special Clause? A. Yes.

Q. Will you agree with me those are all of them clauses applying to events which may occur during the performance of the charter-party?

Mr. Raeburn: I object to that question on the ground that the witness is not a lawyer.

By Mr. Le Quesne.

197 Q. Do you agree with me? A. No, I am not a lawyer.

Q. I ask you not as a lawyer but as a ship owner. Do you not agree these clauses relate to events which may occur during the performance of the charter-party? A. I have never studied these clauses from this point of view.

Q. From what point of view? A. A general point of view.

Q. Of a ship owner? A. Yes.

Q. Now, do not you agree with me that these clauses relate to events which may occur during the performance of the charter-party?

198 Mr. Raeburn: I object to the witness being pressed to answer questions which are not for him.

A. I cannot say I am quite sure they would relate only to events that would occur during the charter-party.

By Mr. Le Quesne.

Q. Now, on your behalf an objection is taken to the jurisdiction of the American court. Were you acquainted with that? A. No, I was not.

Q. Now that you have that piece of information, I would like to draw your attention to one of two things in the charter-party. This was a charter made in New York?

Mr. Raeburn: I object to the question on the ground that the charter-party speaks for itself.

A. I believe so.

By Mr. Le Quesne.

Q. By your agents in New York? A. Yes.

Q. For a voyage from an American port? A. 200
Yes.

Q. I think that by clause 22 of it, it is subject to the maritime rules of the New York Produce Exchange?

Mr. Raeburn: I object to that question on the ground that it is not for the witness and is waste of time, and unnecessarily incurring extra expense.

A. That appears to be correct.

Q. And also by clause 23 of the Harter Act? A. Yes.

Q. You also rely on your pleadings upon a certain act known as the Defence of the Realm Act 1915, and that Act you must accept from me, subject to Mr. Raeburn's correction, relates to an interference with the contracts which arise from the necessity of complying with any requirements, regulations, or restrictions of the Army Council under the Defence of the Realm Act. My question is this: You agree with me that this vessel was requisitioned under the Proclamation of the 3rd of August, 1914? 201

202

Deposition of S. C. Hogarth—Cross.

Mr. Raeburn: I object to that question on the ground that the witness cannot say and it is for the Admiralty, and not the witness.

A. I cannot say.

By Mr. Le Quesne.

Q. Are you of opinion that she was requisitioned under anything other than the Proclamation of the 3rd August, 1914?

Mr. Raeburn: I object to that question on the ground that the witness cannot say.

203

A. I cannot say, as I am not competent to answer.

By Mr. Le Quesne.

Q. I ask your opinion on the matter?

Mr. Raeburn: I object to the witness' opinion being asked.

By Mr. Le Quesne.

Q. You may decline to answer, and it will be put on the note. A. I decline to answer, as I do not feel competent to answer the question.

204

Q. A letter from you to Messrs. Harley of the 9th April, 1915, or a copy of it, refers in its paragraph to a telegram sent by you in reply to their two telegrams of the 9th April. I should like to see that (it was produced). Will you look at the copy of your letter of the 9th April to Messrs. Harley? A. Yes.

Q. In the first paragraph there is a reference to "our telegrams in reply"? A. Yes.

Q. Is this document which has just been handed to me by the solicitors acting for the respondents a correct copy of that telegram? A. I cannot say it is a correct copy. It appears to me to be a correct copy.

Q. Will you enquire for the original from Messrs. Harley? A. I have no doubt Mr. Harley will be able to produce it.

Re-examination by Mr. Raeburn.

Q. You said in answer to my learned friend that the Admiralty telegram was all that you acted upon? A. That is so.

206

Q. I do not know quite what you mean by "acted upon." Did you act or the Admiralty act? A. The Admiralty acted. We regarded that telegram as the final requisition of the ship.

Q. That was after the telegram was received as far as you were concerned? A. I think we telegraphed to Mr. Harley on Mr. Harley's suggestion of the previous afternoon.

Q. But you can act on a telegram by doing something or doing nothing—both the sender and receiver. What did you do in reference to the steamer after the telegram was received? A. Nothing immediately after the telegram was received.

Q. It is suggested that you took no steps to tender her to the Texas Company? A. No, we did not.

207

Q. That would have involved sending her out to Port Arthur and tendering her there? A. Yes.

Q. What did the Admiralty do? Your ship is lying in London; you receive a telegram saying she is requisitioned. What happened after that as far as the steamer is concerned? A. The Admiralty notified us of the requirements for the carriage of

mules which we knew as a matter of fact through Mr. Harley and we agreed to the requirements and the rate they offered us per head. We thereupon fitted the vessel up with wireless telegraphy and did other things.

Q. Who told you where to send the vessel? A. The Admiralty.

Q. Now these Tharsis and Alkali Companies' contracts were for the carriage of copper ore? A. It was the sulphur that was important in that cargo to be used for high explosive.

209 Q. Were these contracts that it was to your interest to carry? A. These contracts were then at about a third of the current rates.

Q. Were they pre-war or post-war contracts? A. Mostly pre-war.

Q. Contracts, at all events, made before January, 1915? A. Yes.

Q. And freights were rising from January, 1915, onwards as my learned friend put it to you? A. Yes, more or less.

Q. You have referred in this letter to the *Baron Yarborough* and the *Baron Kelvin* being released; were they two of the smaller ships? A. Yes.

Q. Which you used for the carriage of pyrites? A. Yes.

210 Q. Was the *Baron Ogilvy* a vessel you would use for the carriage of pyrites? A. No, she was much too big.

Q. I think you said to my learned friend in cross-examination that you had had considerable experience of requisitions of the Admiralty before this date? A. Yes.

Q. Have you had experience of endeavoring to get vessels released by the Admiralty? A. Yes.

Q. Have you considered you had any argument worth putting forward to the Admiralty in respect

of the *Baron Ogilvy* to get her released? A. No, I considered I had no argument; I could not plead it was in the national interest that a cargo of oil should be carried from the States to the Cape.

Q. You gave the profit you would have made per month under the Texas Company's charter? A. Very approximately.

Q. At the rate you were being paid per for mules by the Admiralty, what did you make per month?

A. A little more than we should have got at the 11s. Blue Book Rate, probably £600 or £700 per month.

Q. As compared with £1,500 to £2,000? A. Yes, carrying oil the steamer would have loaded 180,000 cases at 2s. per case and, roughly, that is £18,000, she would have left about £7,000 profit on the oil voyage.

212

Q. And in three months of Admiralty requisition on the terms on which you were what was the profit?

A. I can speak more accurately on Blue Book Rates, and this we considered a little better. On Blue Book Rates she would have made £500 a month, but we took a lot of responsibility and trouble in providing muleteers and quarters and we got £100 more.

Q. Did you make a considerable loss by having the vessel requisitioned? A. A very great loss.

Q. It is suggested you refrained from taking measures to get the *Baron Ogilvy* free because it was to your interest in some other way, to have her requisitioned. Is there a word of truth that your personal interest or the interest of your company came into the matter at all? A. No.

213

Further cross-examination by Mr. Le Quesne.

Q. If you carried out the charter with the Texas Company you would have had to bear the war risks? A. Undoubtedly.

214

Deposition of S. C. Hogarth—Recross.

Q. The government themselves bore the war risk while the vessel was employed by them? A. Yes.

Q. What difference did you allow for that? A. I counted that in the figures I gave. The only war risk was on the voyage out. The war risk on the voyage from Port Arthur to the Cape was really no risk and the rates were very low. It was an unimportant question.

Q. You have made, you say, an allowance for the war risk you would have had to bear yourself? A. Yes.

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(Counsel and solicitors agreed to waive the reading over to and the signature of this evidence by the witness.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

216

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING COMPANY,
LIMITED, as owners of the
Steamship *Baron Ogilvy*, and
HUGH HOGARTH & SON,
Respondents.

In Admiralty.

Depositions of witnesses taken at London, on Commission, on the 31st January, 1918.

CHARLES ROBERTSON DUNLOP, sworn as a witness on behalf of the respondents, testified as follows:

Examined by Mr. Racburn.

Q. Mr. Charles Robertson Dunlop, you are a member of the English Bar? A. Yes.

Q. And your various qualifications, I think, are stated in a memorandum which you have been good enough to prepare, setting out the law of England in regard to the subject of requisitioning of ships? A. Yes.

Q. And the exercise of the King's prerogative in that and certain other respects? A. Yes.

218

Q. I think you are prepared to put in for convenience sake a copy of the statement that you have made? A. I am.

(Document produced and marked "C. R. D. 1.")

Q. I think there are one or two questions which I ought to ask you upon this. You refer, in the course of your statement, to the Proclamation of the 3rd August, 1914, with regard to the requisitioning of ships? A. Yes.

Q. Do you produce a copy of that Proclamation? A. I do.

(Document produced and marked "C. R. D. 2.")

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Q. Another matter is this, have you been shown the documents by which this ship was in fact requisitioned? A. I have.

Q. I see the word "documents" in the plural. In point of fact I think the actual requisition was done by a telegram, I understand, was it not? A. I understand so.

Mr. Le Quesne: Do I understand you do not contend that she was requisitioned by anything other than the telegram?

Mr. Raeburn: I only speak from the document I have got; I cannot give evidence in the matter. The only document I have is first the telegram of the 10th April, 1915, signed "Transports," sent from the Admiralty to Hogarth, Glasgow: 'S.S. *Baron Ogilvy*' is requisitioned under Royal Proclamation for Government services."

By Mr. Raeburn.

Q. In order that you may see it, that I understand was the original document (handed)? A. Yes.

Q. Are you familiar with that class of telegram where ships have been requisitioned? A. I am, I have seen them frequently.

Q. In your view, does a requisition by a telegram in that way constitute a valid and effectual requisitioning of the ship? A. It does.

Q. And a valid exercise of the King's prerogative? A. Yes.

Q. The telegram from Transports to Hogarth, Glasgow, is in the bundle which was produced to Mr. Hogarth. Then in addition to that, have you been shown a letter from the Admiralty dated the 15th April, 1915, dealing with the terms and conditions under which the vessel was to be run for the government? A. I have; I think the telegram would be sufficient without the letter.

Q. At the conclusion of your statement I think you wish to add two references? A. Yes. With reference to the doctrine of the frustration of the adventure by reason of the requisitioning, I should like to refer to the decision of Mr. Justice Atkin in

the case of *Lloyd Royal Belge Societe Anonyme v. Stathatos*, which at present is only reported, as far as I know, in 33 Times Law Reports, page 390. This decision has recently been affirmed by the Court of Appeal. The judgment of the Court of Appeal is not yet reported, but I expect it will be in due course. In the case that I have referred to Mr. Justice Atkin adopted with approval the definition of the doctrine of frustration of Mr. Justice Bailhache in *Admiral Shipping Company v. Weidner Hopkins & Company*, reported in, 1917, I King's Bench at page 242, a definition which was approved by the Court of Appeal in the *Admiral Shipping Company's* case. What Mr. Justice Bailhache said was that the commercial frustration of an adventure by delay meant the happening of some unforeseen delay without the fault of either party to the contract, of such a character as that by it the fulfillment of the contract in the only way in which fulfillment is contemplated and practicable is so inordinately postponed that its fulfillment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.

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Q. Is that all that you desire to say upon that case? A. Applying the doctrine of frustration as there defined to the facts of the same in *Lloyd Royal Belge Societe Anonyme v. Stathatos*, Mr. Justice Atkin said that the detention by the British Government for reasons of State, which would not be fully known to the parties, and for a period, the duration of which must be uncertain and might be prolonged appeared to him to be just such a

225

delay as falls within the doctrine as defined in the words he had quoted.

Q. Now, I want to ask you generally does your statement that you have been good enough to prepare, to the best of your knowledge, set out accurately the law of England upon the subject with which it deals? A. In my opinion, it does.

Q. I do not know whether it has been brought to your attention that in this case no express exception of restraint of princes appears in the charter-party which is sued upon. What, if any, effect would the fact that that exception does not appear have upon your view of the effect of the requisitioning of this ship upon the contract? A. In my opinion, the absence of the usual exception of restraint of princes makes no difference to the effect in English law of the requisitioning of the ship.

Q. Could we have one example of a case in which a requisitioning, not necessarily of a ship, by the British Government, has been held by our courts here to excuse non-performance of a contract, although there was no exception in the contract dealing with the matter? A. Yes, the case of *Shipton Anderson & Company v. Harrison Brothers & Company*, reported in 1915, 3 King's Bench, page 676, is a case which, in my opinion, establishes that the effect of the requisitioning of the *Baron Ogilvy* by the British Government was to relieve the owners of any obligation to perform the charter-party, or to pay damages for not performing it, and the effect of the requisition was to put an end to the charter-party. I have set out in my opinion the effect of the *Shipton Anderson & Co. v. Harrison Brothers*, and the relevant expression from the judgments of the Court, and particularly the illuminating judgment of Lord Reading, Lord Chief Justice.

Q. Upon a point which is not dealt with specifically, I think, in your statement, just a question or two. Since the war broke out has the Legislature provided from time to time certain statutory defences to persons sued for non-compliance or non-performance of contracts, where non-performance has been prevented or hindered by government requirements. A. It has; in the first place by the Defence of the Realm (Amendment) Number 2, Act 1915.

Q. Copy of which you are good enough to produce? A. Yes.

(Document produced and marked "C. R. 230
D. 3.")

It is the 5th George V., Chapter 37. That provides in subsection 2 of Section 1: "It is hereby declared that where the fulfillment by any person of any contract is interfered with by the necessity on the part himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty" * * * "under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfillment of the contract so far as it is due to that interference."

231

Q. Having regard to the terms of that section, suppose this action had been brought in an English court, in your view, would that section of itself afford a defence? A. No, in my opinion, it would not, but in my view the sub-section is declaratory of the rule of common law.

Q. In addition to that act which you have been good enough to refer to, has there been passed another act giving statutory defence? A. Yes.

Mr. Le Quesne: I object to this. This act is not pleaded, and no issue relating to it is raised on the pleadings.

By Mr. Raeburn.

Q. Will you please answer? A. The act to which I am about to refer is the Courts (Emergency Powers) Act 1917, of which I produce a print; it is the 7th and 8th George V, Chapter 25.

(Document produced and marked "C. R. D. 4.")

Q. The relevant section is number 3? A. Yes. By Section 3 of that act it is provided that: "Where, before or after the passing of this Act, the non-fulfillment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government department or of a competent naval or military authority made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government department with the object of preventing transactions which, in the opinion of the department, would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfillment of the contract."

Q. In your view, if this action has been brought, and were now to come on in an English court, would that section afford a statutory defence? A. In my opinion, it would.

(It was arranged that the cross-examination of this witness should be proceeded with on a subsequent day to be fixed.)

ERNEST JULIAN FOLEY, sworn as a witness on behalf of the respondents, testified as follows:

Examined by Mr. Raeburn.

Q. Ernest Julian Foley, are you Director of Military Sea Transport? A. That is so.

Q. And at the time of the requisitioning of the *Baron Ogilvy* in April, 1915, were you Assistant Director (Military) to His Majesty's Director of Transports? A. That is so.

Q. Is the Director of Transports the head of that department of the British Admiralty which deals with all questions of transport and requisition? A. It should be sea transport; it does not apply to land transport. 236

Q. Under the directions of the Lords Commissioners of the Admiralty? A. Yes.

Q. I think the actual office of Director of Transports was constituted many years ago, long before this war? A. Yes, many years ago.

Q. The Lords Commissioners act in all matters regarding requisition of ships through the Director of Transports? A. In all matters.

Q. Do the Lords Commissioners of the Admiralty form a branch of the executive government? A. They do.

Q. And do they exercise the power of the Crown as regards naval matters? A. They do. 237.

Q. I think they are constituted under certain Acts of Parliament which are known generally as the Admiralty Acts? A. Yes, and under a Patent; I think the actual Admiralty Board of any moment is created by a Patent.

Q. In the month of April, 1915, and for some time before that, had the British Government been in

urgent need of tonnage? A. Very urgent, indeed.

Q. For what purpose? A. Military and naval purposes.

Q. In connection with the present war? A. The carrying on of the war.

Q. Did you, in order that you might supply the urgent needs of the government, acquire from time to time particulars as to the movements of the various ships comprising the British Mercantile Marine? A. We did.

239 Q. Had you information amongst others as to the movements of the vessels belonging to the Hogarth Shipping Company, and managed by Messrs. Hogarth & Sons? A. Yes.

Q. Were you aware that the *Baron Ogilvy* was expected to arrive in London towards the end of March, 1915? A. Yes, I was aware of that.

Q. I think you had been in touch with Messrs. Harley & Company, who were acting as the owners' agents in London? A. Yes, that is so.

Q. Did Messrs. Harley & Company inform you of the nature of the employment which the *Baron Ogilvy* was fixed to take up after her arrival on this side? A. Yes, they did.

Q. What was the employment? A. I can refer to notes, I suppose, because these are all matters of memory?

Mr. Le Quesne: Was it conversation or writing?

By Mr. Raeburn.

Q. Did Harley & Company come and see you, or did you communicate with them in writing? A. They saw us; the greater part of the work was done by personal interviews.

Mr. Le Quesne: Is a representative of Messrs. Harley being called?

Mr. Raeburn: I do not know; not to-day, certainly.

Mr. Le Quesne: In that case I must object to this evidence as hearsay.

By Mr. Raeburn.

Q. I will put it in this way: So far as your information went, what was the future employment of the vessel about to be?

(Question objected to.)

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A. She was to go to Port Arthur to load for certain ports in the Cape under charter-party arranged by Messrs. Hogarth with a firm whose name I do not know.

Q. Did you know what she was to carry? A. To load oil.

Q. Before the date when the vessel was actually requisitioned had you any request from the owners or Messrs. Harley that she should not be taken?

(Question objected to.)

A. We had.

Q. What treatment, in effect, did this question receive? A. We did as we did with everybody; we listened to what they had to say and did our best to avoid hardship, but we needed the ships, we needed the prompt ships, we needed the suitable ships, and therefore we took them.

243

Q. In those circumstances was it found essential to requisition the *Baron Ogilvy*? A. Yes. This ship was particularly suitable for our services; we wanted her for the carriage of mules.

Q. I think, in the result a requisitioning telegram, dated the 10th April, 1915, which is referred to in Mr. Dunlop's evidence, was sent by you to Messrs. Hogarth in Glasgow? A. That is so.

Q. Acquainting them that the vessel was requisitioned? A. Yes.

Q. Since the outbreak of the war, I need scarcely ask, you have requisitioned a very large amount of British tonnage? A. A very large amount.

Q. Is the method of requisitioning that was adopted in this case, namely, the sending of a requisitioning telegram, the method you adopted in other cases? A. Exactly the same.

245

Q. In all other cases? A. Yes, in all other cases.

Q. In certain other cases I think I am right in saying what has sometimes been referred to as a requisitioning letter was sent, following up the telegram? A. That is so; it should go in all cases. The fact that it did not in this case, so far as I can find—I cannot find a copy of such a letter—is simply a breakdown in official routine. The telegram was sent, which was the executive side of it.

Q. Which in your view is the operative instruction? A. The order itself, however it is communicated. The order was conveyed in the telegram.

246

Q. Suppose Messrs. Hogarth had refused to conform to the requisition communicated in the telegram, can you tell us what the result of that refusal would have been? A. As far as I am concerned, I should have taken the ship; whether any pains and penalties would have followed to Messrs. Hogarth I never enquired; I should have taken the ship.

Q. I do not know whether any representation in fact was made to you by either the owners or Messrs. Harley & Company, their agents, after you

had requisitioned her in the way you have stated, to have her released?

(Question objected to.)

A. That is very difficult to say. I had constant interviews with Messrs. Hogarth and Messrs. Harley in which they pressed for the release of steamers. It was at that time a constant plea from all ship owners, and Messrs. Hogarth were not less persistent than others.

Q. Having regard to the nature of the employment which if the vessel had not been requisitioned she was about to take up, that is to say the carrying of oil from Texas to Cape ports, would a request by the owners or Messrs. Harley & Co. for her release have resulted in her being released? A. Certainly not. 248

Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interests of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance. 249

Q. Was it for the carriage of mules to this country that the *Baron Ogilvy* was in fact employed? A. That is so.

Q. I think she made four voyages altogether, did she not, with mules? A. I have not a record; I can give you that if you wish it; I know she made a number of voyages.

Q. In regard to the terms of her employment, I think it was arranged, was it not, by a letter from

your department to the Transport Department of the 15th April, 1915, addressed to the owners' agents, Messrs. Harley & Co., and signed by you, that the basis of remuneration should be a rate per head of mules? A. That is so.

Q. Was that arrangement agreed to at the request of the owners? A. It came at the suggestion of Messrs. Harley, presumably acting with the owners.

Q. Being an alternative to simply the ordinary remuneration at Blue Book rates? A. That is so.

251 Q. Did it happen to suit the government that a rate per head should be paid? A. Oh, yes, we should not have paid it otherwise.

Q. Would that relieve the government of the trouble of making certain disbursements? A. It relieved the government of the trouble of putting up the proper fittings, providing forage, and providing attendants and carrying out a large amount of detail work which it was difficult to do at that time, and it was avoided by paying the rate per head.

Q. The putting up of the fittings and the other matters would be paid for by the owners out of the rate per head? A. Yes.

252 Q. Whether or not it was better for the owners from the point of view of payment you are hardly in a position to say? A. I would not have made the offer unless I made it clear to my mind that we were not paying more than the alternative arrangement would have cost us under the Blue Book rate of hire plus the cost to the government of supplying fittings. The owner was in a position to make such arrangements and had resources, and I had not. I should have had to carry it out *ad hoc*.

Q. I do not know whether you have the date, but I think I am right in saying that the vessel continued to be employed till the 20th October, 1915, when she was released from government service?

A. Yes.

Cross-examination by Mr. Le Quesne.

Q. For what were these mules required? A. For the army.

Q. Did you receive instructions from some military authority to that effect? A. We received requests; a requisition from the military for the conveyance of certain numbers of animals.

554

Q. So that you do not speak of your own knowledge when you say that these mules were required for military purposes; you merely pass on to us information which was given to you by some military authority? A. Quite.

Q. Can you tell us where the animals for use in this country or elsewhere? A. Elsewhere.

Q. And to what port were they actually carried by this ship? A. In this country—do you mean their ultimate destination?

Q. At what port were they discharged by the vessel? A. I am afraid I do not know; it would vary between Avonmouth, Liverpool, and so forth.

Q. It would be England? A. A port in the United Kingdom. 255

Q. Are you familiar with the terms of the Proclamation of the 3rd August, 1914? A. Yes.

Q. In the beginning of that Proclamation it is stated: "Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests; and whereas the measures approved to be taken require the immediate employment of a large number of vessels"—for certain

your department to the Transport Department of the 15th April, 1915, addressed to the owners' agents, Messrs. Harley & Co., and signed by you, that the basis of remuneration should be a rate per head of mules? A. That is so.

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255

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Q. In the beginning of that Proclamation it is stated: "Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests; and whereas the measures approved to be taken require the immediate employment of a large number of vessels"—for certain

purposes—"but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon." Do you remember that introductory paragraph? A. Oh, yes.

Q. Do you remember that the Proclamation goes on to say: "Now, therefore, we authorize and empower the Lords Commissioners of the Admiralty by warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship" and so on? A. Yes.

Q. Now, first of all, was this vessel requisitioned by any warrant under the hand of the Secretary of the Admiralty or of any flag officer? A. Do you mean is the actual warrant in existence, naming the *Baron Ogilvy*, signed by the Secretary of the Admiralty or a flag officer?

Q. Yes. A. Not to my knowledge.

Q. Is there any document in existence here to your knowledge requisitioning this vessel, if she was requisitioned, apart from the document to which you referred in your examination-in-chief? A. No.

Q. Therefore, if a requisition is only valid when made by a warrant, this vessel was never validly requisitioned? A. The "if" leaves nothing to answer. There is nothing I can answer then.

Q. You do not feel able to answer that question? A. My answer would be not as a lawyer, but as an ordinary person, that that Proclamation is a Proclamation of the Crown's intention to do certain things, but that the Proclamation does not confer upon the Crown power to do those things; the power that the Crown had to take necessary steps for the defence of the realm is a preroga-

tive right of the Crown, and that right is exercised in any manner the Crown chooses; this Proclamation advises the community that the Crown is going to do this. It is no use noting this because I am no lawyer; I am merely giving my opinion. It merely advises the shipowners that the Crown is going to take these ships, and puts in the last portion of it a consolatory paragraph for the shipowner, to the effect that the Crown intends to pay for doing it, or to pay compensation for doing it.

Q. In requisitioning this vessel, you were acting, were you not, on behalf of the Lords Commissioners of the Admiralty? A. Undoubtedly.

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Q. Are there not a large number of vessels engaged at present on public service under the directions of your department which have not been requisitioned, but have been chartered to you by their owners? A. Of British ships, ships under the British flag to which the rights of requisition apply in the sense contemplated in that Proclamation; very very few. There are some in which we have made charter-party agreements, but I think in the majority of those cases the agreement has been made with the requisition in the background, and in negotiating the terms have been fixed relatively to the power in us to requisition and the right of compensation is fixed by the Blue Book, although we may then have framed a charter-party to meet mutual needs.

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Q. In other words, in fixing those charter-parties both parties understood that you, one of the contracting parties, hold the big stick? A. That is so; in some cases we wanted more than the mere ship and so on.

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Q. Is not that exactly what happened in this case? A. No; in this case the ship was actually requisitioned; there was no charter-party made.

Q. Did you not receive a letter from Messrs. Harley & Co. dated the 9th April, 1915, and beginning "With reference to your verbal notice of requisitioning"? A. Yes.

Q. Did you also receive a letter of the 10th April from Messrs. Harley & Co. beginning "We beg to acknowledge receipt of your notice of requisition"? A. Yes.

263 Q. Would you be good enough to look at the opening words of both letters. The opening words of the former letter are: "With reference to your verbal notice of requisitioning this steamer we beg to say that if it would suit your purpose equally well to charter her for four trips from New Orleans to Avonmouth or Liverpool for the conveyance of mules, that owners would be agreeable," and so on, and the opening words of the later letter are: "Permit us to say that if it would suit your purpose equally as well to charter her for four trips from New Orleans to Avonmouth or Liverpool for the conveyance of mules that owners would be agreeable," and so on. Did you in reply to that letter send a telegram to Messrs. Harley, dated the 10th April, 1915, to this effect: "Your offer *Baron Ogilvy* four voyages conveyances from New Orleans to Avonmouth or Liverpool freight thirteen pounds ten shillings per head gratuity ten shillings each animal landed alive is accepted"? A. Quite.

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Q. Did you afterwards, on the 15th April, write to Messrs. Harley the letter to which I have already referred? A. Yes.

Q. The opening words of that are: "With reference to your letter of the 10th instant, and in

confirmation of my telegram of the same date, I beg to inform you that your tender of the S. S. *Baron Ogilvy* is accepted"? A. Quite.

Q. Do you still say, in the light of the language used in those three letters, and in that telegram that this vessel was not chartered to you by her owners? A. Surely the question is, what exactly you mean by chartered? If you mean I made an agreement with the owners after the requisition, certainly, but if you mean the owners chartered to me freely in the market sense of the term chartered, but that they had a free boat that they offered at the market rate, and I took it, no, nothing of the sort.

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Q. Is not that what happened, that you sent to the owners the telegram of the 10th April, and the owners under the pressure of that telegram offered to charter the vessel to you, and you accepted the offer? A. It is rather difficult to answer the question, you put it rather curiously, if I may say so; I requisitioned the ship and afterwards the owners and myself agreed to a certain basis of payment; that is really the way it is in my mind.

Q. That is your view of the transaction? A. That is my view of the transaction.

Q. You would not say that the language employed in the letters was inaccurate? A. No, because after the requisitioning telegram went a certain offer was made to us, and we accepted it, but all this is the sequence of the requisitioning of the ship.

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Q. Is not this just one of these instances in which the shipowner has bargained with you on the basis that you had the big stick? A. No, the point is the shipowner has his ship taken from him; then all he can do as a prudent shipowner is to make the best he can of it with us. I had something I

wanted from him outside the ordinary requisition and it suited him to take that line.

Q. The result of the arrangement was that you obtained something from him you would not have obtained if the vessel had been requisitioned in the ordinary way? A. Quite, that is so.

Q. Your letter of the 15th April, in clause number 2, says: "Conditions to be as at present operative in the case of other vessels belonging to Messrs. Hogarth & Sons." That is in respect of the *Baron Ogilvy*? A. That is so.

Q. Can you tell me whether the conditions governing the use of their other vessels were set out in writing? A. Oh, yes.

Q. You, I presume, have not any documents with you? A. Not with me, but I could send them.

Q. I presume they would be in the possession of Messrs. Hogarth? A. Certainly, or their agents.

Q. You remember, do you not, that the preamble of the Proclamation states that the requisitioning to which the Proclamation relates is to take place because the need of employment of vessels is so urgent that there is no time for a mutual agreement of the terms of engagement? A. Quite.

Q. Was not this a case in which it was happily possible for the parties to mutually agree upon the terms of engagement? A. No, not from my point of view, the reason being that we were dealing with a very large number of ships and you probably know that negotiations to arrive at a rate to be agreed between two people are a lengthy and troublesome process; there was no possibility of doing it.

Q. You had already, in the case of other ships belonging to this same line, arrived at certain conditions upon which they were being worked? A. Quite.

Q. And in respect of this ship you were able to agree that the same conditions should apply?

A. Quite.

Q. It was not, therefore, either difficult or a lengthy business to come to a mutual agreement as to the terms of engagement with regard to this particular vessel? A. It was not a difficult or lengthy business when I had requisitioned her, but to conclude a bargain with them on the basis of a free ship would have been a difficult and lengthy business. I could not have done it; the ship had a charter she could not break. It was impossible for myself and the owners to come to an agreement for the use of that ship. I had to take the ship by the exercise of the Crown's powers. Quite obviously there was no question of discussing terms with the owner; he had a prior engagement for the ship.

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Q. Had you not, as a matter of fact, given some intimation to Messrs. Harley before the 10th April that you would probably be requiring this vessel?

A. Yes, I think we had.

Q. Before the 9th April? A. I think so; our need was very well known; our whole purpose of getting the particulars of those ships was that we should be up to date in their position and so forth.

Q. Had you not made it plain to them that if this vessel was not chartered to you on the terms on which you were already employing the other vessels of this line, you would have to requisition her?

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A. Certainly not. May I point out again there is no question of charter; the owners could not charter the ship to us. They had a charter for the ship.

Q. I think you told us that in most cases a requisitioning letter is sent, and, according to the rules

in your department, such a letter would be sent in all cases? A. Certainly.

Q. You expressed the view, did you not, that the telegram in itself was sufficient? A. Yes, but I plead guilty to the fault of office organization which did not permit the letter to go. You must remember the pressure and the number of ships dealt with.

Q. On what do you base your statement that the telegram alone is sufficient? A. Simply this that the ship is taken by order of the Crown, however the order is conveyed; the order is operative when it is received. That telegram conveys the Crown's order and that order must be obeyed.

Q. You would not contend, would you, that the whole of the prerogative of the Crown is vested in every one of the servants of the Crown? A. I do not think I can follow you into that sort of thing. Quite obviously, the Crown works through certain channels, and a servant who occupies a particular post to carry out particular duties for that purpose carries the prerogative of the Crown; but obviously, if I commandeered a horse for land transport, I should be shot at; it is not my business. If I, for the Director of Transports, commandeer a ship, that is my business, and the channel I am in is the one through which the Crown's prerogative works.

Q. You would agree your power to requisition vessels is the power conferred upon you by this Proclamation? A. With respect, no. I think the power is the power of the Crown which lies behind the Proclamation. I always read that Proclamation myself as merely declaratory, an advertisement to the shipowners first that we are going to take ships, and, secondly, which they needed to assure them, that we were going to pay for them, and that the compensation, which was an impor-

tant point to them, was to be fixed by a panel including shipowners. You see, it was a new thing that we were dealing with, the taking of a large number of ships, very urgently needed for civil and military service. We had to give some idea of how we were going to do it, and how we were going to pay.

Q. Going back to the list of vessels that are chartered to you, could you give me any idea of the number of vessels beyond that list? A. No, I could not; it is a very small number compared with the total ships for service.

Re-examination by Mr. Raeburn.

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Q. You have been asked whether any warrant was issued under the hand of the Secretary of the Admiralty or any flag officer requisitioning the *Baron Ogilvy*; I think you said no. Do you know whether that method of requisition has ever been adopted in this war? A. Flag officers have requisitioned on stations abroad in certain cases.

Q. When you are requisitioning through your department, that is to say, in London here, what is done? A. The letter which follows the telegram usually is a Secretary of the Admiralty letter; a block signature letter.

Q. A printed signature? A. That is so. There is no formal warrant or anything of the sort.

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Q. Just to get the sequence of events, about this 9th and 10th April, it would rather appear—tell me if I am right—that on or before the 9th April you had verbally requisitioned the *Baron Ogilvy*. Would you look at the first letter to which my friend referred? A. "With reference to your verbal notice of requisitioning this steamer." We told Messrs. Harley obviously that we were going to take

that steamer. The actual telegram sent on the 10th I think was at 8.18 A. M., very early, so the decision was come to on the 9th. As Harley was in constant attendance at our office, he would have been told on the 9th.

Q. Then there was an arrangement made as to the terms upon which the vessel should run for the government? A. Quite.

Q. It is referred to there as chartering her? A. Yes.

Q. You were one of the parties to that arrangement? A. Yes, I was.

Q. Was that, in your view, a voluntary charter of the vessel by the owners to the Director of Transports? A. Not voluntary in any sense except this, that he was not bound after the ship was requisitioned to accept these conditions as to giving us fittings and attendants, and forage and so forth.

Q. In other words, you had a right, as you told us, by the prerogative of the Crown to requisition a ship? A. Which I exercised.

Q. But had you any right to require the owner to alter her or put up fittings? A. I had no right to do that.

Q. As I understand, for the carriage of the mules, that would have to be done by the Admiralty? A. That would have to be done by the Admiralty.

Q. And it suited you to have that done by the owners instead? A. It suited me to pay Hogarths, as my agents, to do it.

Q. Supposing you had not come to an arrangement as to the terms on which this vessel was to run on these mule trips, what could have happened; would Hogarth have had his vessel free? A. No, I should have taken the ship, had her fitted myself, and he would have been paid the Blue Book rate of hire and nothing more, in addition to which

there might have been his liability for punishment.

Q. I dare say they have heard in the States, as we have here, of what we call in this country Hobson's choice? A. Yes.

Q. Would it be right or wrong to suggest that with regard to this ship, so far as Messrs. Hogarths were concerned, it was rather a case of Hobson's choice? A. It was entirely a case of Hobson's choice.

Further cross-examination by Mr. Le Quesne.

Q. There are two other things I should like to ask. Do not Messrs. Harley act as agents for you in looking out for vessels? A. In no sense; they are brokers. 284

Q. Do they not, in their capacity as brokers, act on behalf of the Admiralty in obtaining information as to vessels that will be suitable for various purposes for which the Admiralty may require them? A. No, I think for purposes of their own profit they come to the Admiralty; the Admiralty does not commission them as agents to ascertain and report; the Admiralty, where it has agents, has a definite appointment for them.

Q. It is true, is it not, that owners in some cases have contended that the Admiralty have no right to requisition these vessels for the particular purposes for which they were being requisitioned? A. I do not think any owner, so far as I know, has questioned that the Admiralty has no right to requisition his vessels; you may be referring to the Holt case. 285

Q. No, I am not. A. I think the owners have contended that the Admiralty have no right to requisition more than the bottom, the ship as it stands, that we have no right to force the owners to run

286 *Deposition of Julian Foley—Recross—Redirect.*

the ship for us. Whether that is so or not, I do not know, but most owners, practically all owners, take the sensible line that having the ship requisitioned they might as well carry on sensibly.

Q. Are you not aware that in the case of the *Crown Steamship Company v. The Lords Commissioners of the Admiralty*, the case of the *Crown of Leon*, the owners contended and are still contending, in a case which is before the Courts, that the power to requisition does not extend to the use made of their vessel on a certain voyage? A. Do you say that claim was made?

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Q. Yes. A. They wished that the ship should not be requisitioned—

Q. Would you answer my question? A. I am not familiar with the *Crown of Leon* case, but I see the point of the objection to the particular use of a ship apart from the power of requisitioning the ship.

Further re-examination by Mr. Racburn.

Q. As you were asked about Harley & Co. and whether they were your agents, I suppose one may take it, agents are usually paid by their principals on some terms or other? A. We have found it so.

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Q. Were Messrs. Harley paid agency by you? A. Certainly not.

Q. Or brokerage? A. Certainly not.

Q. Or commission? A. Certainly not.

Q. Did you pay brokerage, or agency, or commission, or whatever you may choose to call it, in connection with the taking of the *Baron Ogilvy*? A. Certainly not.

Mr. Le Quesne: I wish to call attention to the fact that some letters have been pro-

duced to us since the occasion upon which I cross-examined Mr. Hogarth. There are matters in those letters upon which I should have cross-examined him if the letters had been before me; and further in the letter dated the 15th April, 1915, one of the letters to which I have just alluded as having been produced since I cross-examined Mr. Hogarth, from Mr. Foley to Messrs. Harley, allusion is made to conditions operative in the case of other vessels belonging to Messrs. Hogarth, and I call for the production of the documents in the possession of Messrs. Hogarth, in which those conditions are laid down.

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(Counsel and solicitors agreed to waive the reading over to, and the signature of, this evidence by the witness.)

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

<p style="text-align: center;">THE TEXAS COMPANY, Libelant,</p> <p style="text-align: center;">v.</p> <p>HOGARTH SHIPPING COMPANY, LIMITED, as owners of the Steamship <i>Baron Ogilvy</i>, and HUGH HOGARTH & SONS, Respondents.</p>	}	In Admiralty.
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Depositions of witnesses taken at London, Eng.,
on Commission, on the 27th February, 1918.

CHARLES ROBERTSON DUNLOP, sworn as a witness
on behalf of the respondents, testified as follows:

Cross-examination by Mr. Le Quesne.

Q. I know that you are familiar with the exact words of the Proclamation of the 3rd August, 1914, but would you be good enough to have them before you for the purpose of the first few questions I am going to ask? You will observe this is a Proclamation headed: "A Proclamation for Authorising the Lords Commissioners of the Admiralty to requisition," and in the Proclamation itself you find the words "We authorise and empower the Lords Commissioners of the Admiralty by warrant

under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition." Do I understand that in your opinion it was competent for the Admiralty to requisition this vessel otherwise than by a warrant such as is described in the terms of the Proclamation? A. Yes.

Q. Do you say that the Lords Commissioners of the Admiralty had authority to requisition in any way which might seem good to them? A. Yes, any British ships whose owners are within the jurisdiction.

Q. For what purpose then, in your opinion, were the words to which I have called your attention inserted in this Proclamation?

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Mr. Raeburn: I take formal objection to that question.

A. I am afraid I cannot answer because I was not in any way a party to the drafting of this Proclamation.

By Mr. Le Quesne.

Q. What meaning do you attach to them, if as I understand, in your opinion, they do not in any way limit the right of the Lords Commissioners to requisition? A. The Proclamation as I have endeavored to explain in my opinion, did not in any way create, limit, or extend the right of the Crown to requisition British ships; the Proclamation was issued for the convenience and instruction of the public to make known the fact that an emergency had arisen, and that the Lords Commissioners would requisition ships within the British Isles or the waters adjacent thereto; but I do not think that this Proclamation was intended to limit, or indeed

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could limit, the prerogative right of the Crown to requisition British ships wherever they might be situated, if the Crown thought it necessary for the defense of the realm that they should be requisitioned. I do remember that after the date of this Proclamation a question arose as to whether there should be a fresh Proclamation extending this Proclamation to British ships anywhere. It was not considered necessary, although later on I believe there was a Proclamation which further stated the circumstances under which the Admiralty would requisition ships. This Proclamation, in my opinion, is merely a public notice that has no statutory effect; it has really no legal effect; the Crown, through the Admiralty could have requisitioned ships without issuing any Proclamation at all.

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Q. I understand, then, in your opinion, the Proclamation cannot limit the prerogative power of the Crown to requisition ships? A. That is my opinion.

Q. But may not the Proclamation limit the method in which specified officials of the Crown are entitled to exercise that part of the Royal prerogative? A. No.

Q. What authority have you for saying that a Proclamation cannot have that effect? A. I know of no authority to the contrary.

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Q. Are you aware of any authority in support of your proposition? A. I do not think any case that I have found has arisen in which the point has been considered. I can hardly conceive circumstances in which it would arise.

Q. You have been shown, I believe, the telegram by which this vessel is said to have been requisitioned? A. Yes, I have.

Q. And I take it that you will agree that that was not a requisition within the language of this

Proclamation? A. No, I do not think it was, although I am not quite sure what a warrant in the Proclamation is; I do not know of any particular form that a warrant must take.

Q. Assuming for the moment that the telegram is not a warrant, I understand that in your opinion it was none the less a good requisition? A. Yes.

Q. Would you be good enough to turn to page 389 of this Manual, on which are printed the rules to be followed in respect of arbitrations which are held in connection with ships that have been requisitioned? A. Yes.

Q. You will notice that in the fourth of these rules it is provided, "If the Admiralty and the Claimant fail to arrive at an agreement within a reasonable time, to be determined in each case by the President of the Board of Arbitration, the Admiralty shall report the matter with the necessary papers to the President." A. Yes. 302

Q. In your opinion, would the Lords Commissioners of the Admiralty be compellable, or would they not, to report a matter to the President, if there had been a failure to agree, and they had failed to report the matter? A. If there had been a dispute between the owners and the Admiralty as to the terms on which the vessel was to be requisitioned, that dispute would under the rules have been referred to the Board of Arbitration referred to in these rules. 303

Q. Supposing the Admiralty, for some reason or other, declined to report the matter to the president or to refer it to him, could they not be compelled to do so? A. I do not know; I do not think that difficulty has ever arisen.

Q. You do not feel able to say whether they could or could not be compelled to act in accordance with that rule? A. My own view is that if the

Admiralty failed to report the matter to the president of the Board of Arbitration, the claimant would be quite free to do so, and that thereupon the president of the Board of Arbitration would communicate with the Admiralty and ask them what they proposed to do, and thus matters would be very quickly brought to a head.

Q. If they declined to report the matter to him, or to deal with it before him, would he not be entitled to deal with it on the footing that they were in default? A. That I do not know; that has never arisen.

Q. Are you aware of any recent decision of the English courts to the effect that a requisition made by a telegram and purporting to be made under this Proclamation is a good requisition? A. Yes, *The Sarpen*.

Q. Was the validity of the requisition at all questioned in *The Sarpen*? A. No, it could not be questioned; if it could have been questioned, I think it clearly would have been.

Q. However that may be, the Court was not called upon to decide between the parties whether the requisition was valid or not? A. No, that is true. Nobody has ever dreamed of taking the point in any case that has come before the English courts.

Q. You are familiar with the later Proclamation relating to the requisitioning of ships, which is dated the 10th November, 1915? A. That was the one I had in my mind, although I had forgotten the date when I was referring to the Proclamation of the 3rd August, a little while ago.

Q. I am correct, am I not, in saying that under that Proclamation the requisition must be signed by some person authorized for the purpose either generally or specially by the president of the Board of Trade? A. I have not got the language of the

Proclamation in my mind, but if that is stated in the Proclamation, I dare say your extract from it is perfectly right, the Proclamation would speak for itself.

Q. Would not the effect of requiring by Proclamation that a requisition should be made in a particular form or by particular persons, be to give some protection to His Majesty's subjects whose ships are to be requisitioned? A. I do not quite understand what you mean.

Q. Would they not have the protection of the authority of the official who is authorized to make the requisition, or to sign the form? A. I think that if any owner of a British ship who received a telegram such as was sent in this case, was in doubt as to whether the telegram was genuine, or was in doubt whether the sender of the telegram was an authorized person, he might insist upon being served with formal documents, and if he wished to be so served, I have no doubt the Admiralty would have served him; but, as everyone knows, these telegrams such as were sent in this case are sent by responsible officials, and every owner of good sense knows that it is quite unnecessary to trouble the Admiralty to follow up that telegram with the issue of formal documents.

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Q. Reverting for a moment to the actual words of the Proclamation of the 3rd August, 1914, the words are "by warrant under the hand of their secretary or under the hand of any flag officer of our Royal Navy"? A. Yes.

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Q. Is it your opinion that the requisition can be validly made by any official in the Admiralty? A. Any official who for the time being is entrusted by the Admiralty with the function of requisitioning ships.

Q. Are the Admiralty, therefore, in your opinion, entitled to entrust someone with that function who is neither their secretary nor a flag officer in the navy? A. Yes, in my opinion, that is so.

Q. In your view, therefore, is it not true to say that the particular words to which I have just referred, "by warrant under the hand of their secretary or under the hand of any flag officer of our Royal Navy," have no effect whatsoever? A. Oh, yes, they have, they empower the Admiralty by means of a warrant under the hand of the secretary or under the hand of a flag officer to requisition, but that does not exclude the power of the Crown through the Admiralty to requisition in any other way that effectively brings to the notice of the British ship owner here that his ship is wanted for national purposes.

Q. Your view is, therefore, that the power of the Lords Commissioners of the Admiralty to requisition vessels was just as great after the issue of this Proclamation as if the Proclamation had not contained the words "by warrant under the hand of their secretary or under the hand of any flag officer of our Royal Navy holding any appointment under the Admiralty"? A. Yes, I do, and, moreover, I say that a British ship owner acting on the faith of a telegram received as in this case dispenses with the issue of a warrant under the hand of the secretary or under the hand of a flag officer; I dare say if he had insisted upon one he could have got one, if he had wanted a formal warrant, but in my experience no British ship owner during this war has asked the Admiralty to issue a formal warrant after the ship owner has received the telegram which is perfectly well understood by every British ship owner.

Q. Does he not so dispense at his own peril, or is it your view that the Lords Commissioners would be as much bound by the telegram on which he acts as if they had requisitioned the vessel by a warrant under the hand of their secretary? A. Yes, that is my view; he bows and submits himself to over-riding necessity and power; whether he bows to the telegram or rebels on receiving the telegram and demands a warrant, I think makes no difference; just as if a policeman had power to arrest you, and you allowed him to arrest you without the issue of a special warrant for the purpose; if you objected to the original arrest the policeman would no doubt in some cases have to produce his warrant; the arrest by the policeman would be none the less in the exercise of executive power whether the power was exercised with or without a warrant.

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Q. I do not wish to pursue the analogy too far, but are there not cases in which an arrest by a policeman without a warrant is not legal? A. That is so.

Q. In this case then, as I understand in your view, although this Proclamation has prescribed the mode in which the Royal prerogative to requisition should be exercised by the Lords Commissioners, the Lords Commissioners are none the less completely at liberty to requisition in any mode that they may choose? A. That is so; that is to say that if the ship owner yields to the first intimation given to him by means of a telegram he dispenses with the use, and both parties dispense with the use of the formal document referred to in the Proclamation, and, I venture to think, dispense with that for very good public reasons, and that is the explanation why throughout this war vessels have been requisitioned by letters and by telegrams, and not by the

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use of formal warrants of the kind referred to in the Proclamation.

Q. Do you say that, assuming a failure to obey a requisition is attended by certain pains and penalties, that those pains and penalties would be attached to a failure to obey the directions contained in the telegram that was forwarded in this case to the ship owners? A. Certainly; if the ship owner on receipt of the telegram assented to it as being a requisitioning.

Q. Would you mind assuming for the moment that he did not so assent, but declined to regard it as a valid requisition? A. Then, if that contingency, which I believe has not arisen, had arisen during this war, the Admiralty would no doubt have served the rebellious ship owner with a formal warrant.

Q. Would they not have been obliged in law to serve him with the warrant before they could make him amenable to the pains and penalties which attached to a failure to obey a requisition? A. That I cannot answer, because, as I say, this question has never arisen, and I do not know what might have happened if the question had arisen.

Q. As regards the right of the Crown to requisition these vessels, and apart from the form of the requisition, can you point to any case in which the right to requisition vessels has been questioned and upheld? A. In the case of *Heilgers & Co. v. The Cambrian Steam Navigation Company, Limited*, 33 Law Times Reports, page 438. In that case the vessel was requisitioned in India, and the question which the charterers were raising was whether the requisitioning had put an end to the charter. The attention of the Court in that case was drawn to the fact that the August 3rd Proclamation refers to ships in British waters, or in waters adjacent thereto, whereas in Heilgers' case the ship, as I

have said, was requisitioned in Indian waters, and it was suggested faintly, and almost immediately withdrawn, that the Crown had no power to requisition this ship in Indian waters, and were therefore more likely to release her within a short time as the charterers were contending; that is how the point arose in that case, but, as I say, the point was suggested, there was nothing in the point, and the learned Judge in his judgment does not take any notice of it.

Q. You are, therefore, as I understand, not aware of any case in which the right of the Crown to requisition a British vessel either in British or foreign waters, has been questioned, and resolutely questioned and upheld by the Court? A. Nobody has had the courage in an English court, and when I say courage, I mean courage and discretion to raise the point; if that was the best point they had, then there was not very much in their case. Might I say in connection with that, in *The Broadmayne*, 1916 Probate, page 64, if my recollection is right, the power of the Crown to requisition is dealt with by Lord Justice Swinfen Eady and Lord Justice Pickford, the power of the Crown to requisition British ships was clearly affirmed, although I agree with you that the power of the Crown to requisition was not disputed in that case. This is the passage that I have in mind, which is at page 67 of 1916 Probate, where Lord Justice Swinfen Eady says: "It is not disputed—indeed, it is beyond dispute—that it is part of the prerogative of the Crown in times of emergency to requisition British ships." He goes on to support that view by reading a passage from the authoritative work on the prerogative, Chitty's *Prerogative of the Crown*. I do not think you could want a clearer judicial statement affirm-

ing the power of the Crown than is contained in the passage that I have quoted.

Q. I think I understood you to say that you are not aware of a case in which that right to requisition has been resolutely questioned and upheld? A. No.

Q. You are familiar, I am sure, with the decision of Mr. Justice Bailhache in the recent case of the *China Mutual Steam Navigation Company, Limited*, v. *Sir Joseph Maclay*, which is reported in the 34th Times Law Reports at page 83? A. Yes.

Q. I think it only fair to ask you if you desire to make any comment upon a paragraph which occurs at page 83 of that report, and which is as follows: "Evidence was given by Mr. Slade, a Barrister at Law, that he had searched the records of the Admiralty at the Record Office, and had found no trace of ships being taken by compulsory powers during the American war of Independence from 1775 to 1882, the War with France from 1793 to 1795, and from 1800 to 1804, and during the War with America in 1812"? A. I may say personally I have made no such search.

Q. Personally you would feel able to agree with me that the periods within which those years fall, say the period from 1750 to 1850, was a sufficiently bellicose period in the history of this country? A. But evidently not giving rise to the conditions which this war has created, which has required the British Government and, indeed, the governments of all our allies, to requisition their own merchant ships for the purpose of carrying on the war and feeding their populations.

Q. You referred just now to an observation of Lord Justice Swinfen Eady in delivering his judgment in the case of *The Broadmayne*? A. Yes.

Q. I have no doubt you are familiar with the observations which he made in dismissing the appeal of the Crown in the *Crown Steamship Company v. The Lords Commissioners of the Admiralty*, which is reported at page 5 of Lloyd's List for the 8th December, 1917? A. I have not got in my mind the case to which you are referring.

Q. I am anxious to have this included in the record; perhaps you will be good enough to look at the passage now and see if you wish to make any comment upon it?

(Document produced and marked "C. R. D. 5.")

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A. Yes, I remember this case, but with the greatest respect, I do not know what bearing it has upon the interesting topics we are discussing in this case.

Q. That is a case, is it not, in which Lord Justice Swinfen Eady did distinctly recognize that there are definite limits to the Crown's rights to requisition? A. I do not so read any extract that you have in the paper you handed to me.

Q. That is the only extract I propose to attach to the record. A. The extract will speak for itself. The question as far as I can understand in that case is whether the Court had power under the Arbitration Act to order the Admiralty Transport Arbitration Board to state a case for the opinion of the Court on a question of law. The right of the Crown to requisition does not appear to have been raised by the ship owner, or the very learned counsel whom I see was representing the ship owner.

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Q. May I give a further reference to the decision in that case before the Divisional Court in 33 Times Law Reports, page 472, in which the point was decided by the Divisional Court, which was afterwards taken on appeal by the Crown to the Court

of Appeal? I only give the reference for the purpose of exactness. I have nothing to submit to you upon it. I understood from your evidence that was given last time that in your view the effect of this requisition was to discharge the contract? A. Yes.

Q. I see in your statement of the law which has been handed to me you refer to a case of *Shipton Anderson & Company v. Harrison Brothers & Company*, 1915, 3 King's Bench, page 676, and you say "the principle deduced by Lord Reading from the authorities in that case was that a party to a contract is excused from performance or from any liability to pay damages for non-performance if the act to be performed is rendered unlawful or impossible of performance by a lawful act of State subsequent to the making of the contract"? A. Yes.

Q. Now, I presume that you will agree that that decision is no authority for the statement that this contract is discharged if the act which is supposed to have operated as a discharge, namely, the requisition, was unlawful, either by reason of the form in which it was made, or otherwise? A. No, the case is not dealing with an impossibility of performance created by an unlawful act of State, but I venture to think that the principle would be precisely the same if the act of State had been technically unlawful.

Q. If the act of State were unlawful there would be no duty imposed upon any subject to obey the act of State, would there? A. There would be no duty in the sense that if he could obtain from a law court a decision that the act of State in question was unlawful, he would not be bound by it, but I anticipate that a ship owner receiving notice of requisition, as in this case, could hardly be called

upon to resist the notice until he had obtained a decision of a law court upon its validity.

Q. If the notice is unlawful, and the subject upon whom it is served and to whom it is issued, declines to obey, then he does not expose himself in law to any pains and penalties, does he, for failing to obey it? A. No, he would not be fined or sent to prison, but I think any British ship owner who was foolish enough to question the legality of a notice of requisition such as was received in this case, would be exposing himself to a very serious risk which no reasonable man would, in my view, say he ought to expose himself to, of resisting and testing by inviting prosecution.

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Q. Is it your view, then, that the requisition in this case operated as a discharge of this charter-party, even though the requisition was unlawful?

A. If it was obviously unlawful, and the view of the Court was that the ship owner had acted unreasonably in obeying it, I do not think that the requisitioning, if unlawful, would excuse him, but if the conclusion of fact was that the ship owner by obeying it had acted reasonably, then I think the principle of *Shipton Anderson & Co. v. Harrison Brothers & Co.* would apply; in other words, a British ship owner receiving a notice of requisition in a form in which hundreds of notices had been issued and obeyed would, in my opinion, be acting unreasonably if he ventured to dispute it, but if he did venture to dispute it, any technical flaw in the notice would be speedily remedied by the Admiralty.

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Q. Is it your view that the requisition operated as a discharge of the contract, if it was unlawful, though not obviously unlawful? A. Yes.

Q. Can you give me any authority in English law for that proposition? A. The law as a rule does not require a man to act unreasonably, and pro-

teets him if he acts reasonably; if he receives a notice which in the mind of any reasonable man would operate as a mandate to him not to perform his contract, then, in my view, he would be effectively prevented from carrying out the contract by yielding to that mandate.

Q. You are familiar with the provisions of Section 3 of the Courts (Emergency Powers) Act, 1917? A. Yes.

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Q. It is provided by that, "Where before or after the passing of this Act the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government Department, or of a competent naval or military authority, made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government Department with the object of preventing transactions which in the opinion of the department would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract." I understand from your answers to the questions I have just been putting to you that you regard Section 3 of that act as merely declaratory of the common law?

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A. I think so; I think it is stating the effect of an order such as was referred to in the section, very much in the language or on the principles elaborated by Lord Reading in the case of *Shipton Anderson & Co. v. Harrison Brothers & Co.*

Q. Is it your view, then, that this section will only operate in the case of a compliance with a requirement, regulation, order or restriction which is a lawful requirement, regulation, order or restric-

tion? A. Yes, I think the section is limited to the particular kind of order that is referred to in the section.

Q. In your judgment it is limited to a lawful order? A. Well, I am not quite sure; I have not considered that with sufficient care to enable my answer really to be of any value.

Q. Assuming, if you would be good enough to assume, that this requisition was not issued by the proper authority, because it was not issued by the secretary of the Admiralty or a flag officer, would this section apply? A. That I would not like to answer.

Q. Would not its application be excluded, seeing that it contains the words "requirement, regulation, order or restriction of any Government Department or of a competent naval or military authority"? A. The competency of the authority is a question which may be quite distinct from the legality of the order made.

Q. Can an authority be competent to make an order which is not within its powers or jurisdiction? A. No, because *ex hypothesi*, if you assume it has not got the power, the answer is no, it has not got the power.

Q. There have been cases, have there not, in which English courts have held within the last two or three years that a requisition did not operate as a determination of a charter-party? A. Oh, yes.

Q. I think I am accurate in stating that the *F. A. Tamplin Steamship Company v. Anglo Mexican Petroleum Products Company* in 1916, 2 Appeal Cases, at page 397, and the *Chinese Mining and Engineering Company v. Sale & Company*, in 1917, 2 King's Bench, at page 599, and the *Rio de Janeiro Tramway Company* case, which was decided in 1916, but not, I believe, yet reported in the Law

Reports, were all cases in which it was held that a requisition did not determine a charter-party? A. Yes.

Q. I think you were asked last time whether your opinion as to the termination of this charter-party by this requisition, would be in any way affected by reason of the fact that the charter-party does not contain the usual clause excepting the restraint of Princes? A. Yes.

Q. I think I understood you to say that your opinion would not be affected by the absence of that clause? A. No.

Q. I presume we can agree that the British Government have been requisitioning vessels ever since the time of the Proclamation of the 3rd August, 1914? A. Yes.

Q. As this charter-party was entered into on the 6th February, 1915, would not an English Court hold that it was entered into under circumstances under which both parties must be taken to have contemplated the possibility of requisitioning and that, therefore, if the ship owner had failed to protect himself against that possibility, he must suffer the consequences? A. Not in my view. That is an argument which has been frequently used and as frequently rejected by the Courts. That is to say, I may put it in this way: It has been argued in many of the cases where the question has been whether the requisitioning put an end to the contract or not, that the presence in the charter-party of a restraint of Princes clause has actually contemplated the event that has happened, and, therefore, the effect of requisitioning has merely been to suspend under the restraint of Princes clause in the charter the charter-party itself, and not to put an end to it. What the Courts have said is that restraint of Princes in the exceptions clause

is not referring to a restraint by requisition of such duration as will put an end to the whole charter-party, including the exceptions clause. For that reason it is immaterial whether the contract contains an exceptions clause or not, because if the requisitioning puts an end to the contract it puts an end to the restraint of Princes clause in the contract.

Q. Would you be good enough to give a reference to a decided case in which that argument was presented to the Court, and rejected by the Court?

A. I happened myself to be using the kind of argument that you are suggesting to me now in a case before the Court of Appeal last week, and I was told by Lord Justice Pickford, and I think, by Lord Justice Scrutton, that I was merely repeating in another form the often discredited arguments. That was a case of *Arthur Capel & Company v. The Bank Line, Limited*. That you may add to your list of decisions in which the requisitioning was held not to put an end to the charter-party.

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Q. Has the decision of the Court of Appeal in that case yet been given? A. Oh, yes. In that case the charter-party contained an express provision giving the charterer an option to cancel the charter-party in the event of the ship being requisitioned. Mr. Justice Rowlatt had held that the requisitioning put an end to the contract, and rejected the contention of the charterer that the charter-party was not put an end to by the requisitioning, but that its operation was merely suspended; but the Court of Appeal rejected the argument that the fact that the parties had expressly in their contract inserted a clause giving the charterer an option to cancel if the ship was requisitioned, did not in any way affect the question whether the delay

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caused by the requisitioning had put an end to the contract. I think that is an *a fortiori* case.

Q. In all that you have been saying about the effect of this requisitioning, you have assumed, I take it, that this is a charter-party to be governed by English law? A. I am only dealing, and can only, I think, be asked to deal with English law. I would not for one moment attempt to deal with the law of any other country with which I am not familiar.

Q. Am I correct in saying that the only two documents that you have considered in this case with regard to the question of the requisitioning, are the telegram of the 10th April, 1915, and the letter of the 15th April, 1915? A. Yes, those were the only two documents which I was asked to consider.

Q. I notice in your statement of the law that you say "a Court cannot enquire into the reasonableness or necessity of any act of a sovereign done in virtue of his prerogative powers"? A. Yes.

Q. Am I to understand that in your view an American Court should not enquire whether or not this so-called requisition operated as a discharge of this contract? A. Oh, no, I do not suggest that. What I suggest is that if, for example, the American Government were to requisition an American ship, and the question was raised in our courts as to whether the requisitioning was valid or invalid, lawful or unlawful, the courts would accept the statement of any authorized official of the American Government that the requisitioning had been done in the exercise of the prerogative rights of the American Government, but the British courts would still be free to decide the question what the legal effect on the contract before it was of the requisitioning.

Q. I think that you also state in that same statement, that in the case of a requisition by the British Government the statement which should be accepted by a Court as conclusive of the necessity for the requisition is a statement on oath of the proper officer of the Crown, and I think that that is the view of the law that was also expressed by Lord Parker in *The Zamora*, 1916, 2 Appeal Cases, page 107? A. Yes.

Re-examination by Mr. Raeburn.

Q. I do not think that I have much to ask you, as you have already largely re-examined yourself, but we have had, as I dare say you know, evidence from the Director of Transports, Mr. Foley, who gave evidence as to the necessity for the requisitioning of this particular ship? A. Yes.

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Q. Would he, in your view, be the proper officer of the Crown, whose oath would be accepted by the Court? A. He would.

Q. You were asked by my friend about several cases which he mentioned in which the requisitioning by the government had been held not to put an end to a charter-party, and he mentioned the *Tamplin* case, the case of the *Chinese Engineering Company v. Sale*, and the *Rio de Janeiro Tramway Company's* case. Were those all cases of time charter-parties? A. They were.

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Q. Over long periods? A. Over very long periods.

Q. Have there been cases before the Courts of voyage charter-parties which have been held to be terminated by requisition? A. Yes.

Q. You have referred to the more important of those in your written statement? A. Yes, I think I have.

Q. In regard to the case of *Arthur Capel, Limited, v. The Bank Line, Limited*, I think the decision of the Court of Appeal that in the circumstances the charter-party was not terminated, was a decision of a majority? A. Yes, it was.

Q. Lord Justice Scrutton dissenting? A. Yes.

Q. So that at present, as regards the point arising upon that particular charter-party, the opinions are two for, and two against? A. Yes; in that case the circumstances were very peculiar.

Q. In that case was it the fact that the vessel was released as it was said by the owners so that they might deliver her to some certain purchaser with whom they had entered into an agreement for sale? A. Yes, in that case the ship was requisitioned before she was delivered under the time charter, and the charterers contended that after she was released by the Admiralty to the owners, although for the purpose of their delivering her to buyers, that they were entitled to delivery of the ship, or to damages for non-delivery.

Q. The subsequent history of that case yet remains to be seen? A. The contest no doubt will be carried even to a higher tribunal.

Q. You were asked a question or two about the effect of the Courts (Emergency Powers) Act 1917, Section 3. I think my learned friend asked you whether you said that the requirement, regulation, order or restriction referred to in that section, must be a legal requirement, regulation, order or restriction? A. Yes.

Q. I do not know whether your attention has been called to a very recent case reported in *Lloyds' List* on last Monday, the 25th February? A. No.

Q. A case which came before Mr. Justice Atkin upon an award stated in the form of a special case by arbitrators? A. Yes, I remember it.

Q. I need not trouble you with the point; it concerned the effect upon a certain contract of an order made by the Food Controller? A. Yes.

Q. It is the case of *A. E. Lawrence & Co. v. Elias Buerger & Company*. One of the points that arose was the effect of Section 3 of the Courts (Emergency Powers) Act? A. Yes.

Q. The learned Judge in dealing with that says this: "In these circumstances I am inclined to think there would be protection even though the Government Department in question had no legal authority in fact for issuing this requirement, regulation or restriction." I thought I should call your attention to that, though in fact he gave no decision; he goes on to say: "I do not think it necessary to go so far as to decide that matter in this particular case." Finally, with regard to these documents under which this requisition took place, you refer to the case of *The Sarpen*. Was that a case in which the status of the tug—the tug was called *The Simla*—was in question? A. Yes.

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Q. Did that involve an enquiry into how she had been requisitioned by the Admiralty, and the effect of the requisition? A. Yes, that is so.

Q. Does it appear from the report in that case that the only documents which had passed were two telegrams? A. That is so. The case is reported in 1916 Probate, at page 306, and what you said appears from the report, that the only documents under which the tug was requisitioned were two telegrams.

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Q. Is it anywhere suggested by the Court that the requisition was not a valid requisition? A. No.

Q. Are you aware of any case whatever in the English courts in which it has ever been suggested that a requisition made by a telegram of this sort was invalid? A. No.

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*Deposition of C. R. Dunlop—Redirect.
Deposition of Sir H. E. Richards—Direct.*

Q. You have been informed, no doubt, as to the facts of the present case? A. I have.

Q. That the vessel actually went on service? A. Yes.

Q. That is to say that the Admiralty took her. Would that in itself be a good requisition, in your view? A. It would.

Q. Apart altogether from any documents whatever? A. That is so.

(Counsel and solicitors agreed to waive the reading over to and the signature of this evidence by the witness.)

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SIR HENRY ERLE RICHARDS, sworn as a witness on behalf of the libellant, testified as follows:

Examined by Mr. Le Quesne.

Q. You are Sir Henry Erle Richards? A. That is so.

Q. You reside at 25 Queen's Gate, and have chambers at 4 Temple Gardens, in the Temple? A. Yes.

Q. You were called to the Bar in 1887, and appointed one of His Majesty's counsel in 1905? A.

360 Yes, that is so.

Q. Will you give your age? A. Fifty-six.

Q. You have practised in the Privy Council and in the Prize Court? A. Yes.

Q. And also you are Professor of International Law at the University of Oxford? A. Yes.

Q. You represented Great Britain in the Venezuelan Arbitration in 1903, I think? A. Yes, I did.

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Q. Were you also counsel in the Samoan Arbitration? A. Yes.

Q. And did you represent Canada and Newfoundland in the North Atlantic Coast Fisheries at the Hague in 1910? A. Yes.

Q. For some years were you Legal Member of the Viceroy of India's Council? A. Yes.

Q. You have devoted considerable attention to such questions as the prerogative of the Crown in times of war and other Constitutional matters? A. I have.

Q. I think that you have been good enough for the sake of convenience to put your opinion upon the matters in this case which have been submitted to you into this statement which I now hand in? A. Yes.

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(Document produced and marked "H. E. R. 1.")

Cross-examination by Mr. Raeburn.

Q. I understand your view to be that a telegram of the type of the telegram which was sent or the form of the telegram which was sent, which doubtless you have seen, purporting to requisition the *Baron Ogilvy*, would not be a valid exercise of the Crown's right to requisition a British ship? A. I am dealing with a particular case of a telegram sent by a particular man who gives an account of himself and nothing more; I think that would not be.

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Q. The telegram in question was sent by the Director of Transports? A. It was sent by Mr. Foley.

Q. He is Director of Transports; he has given evidence. He is in fact the Director of Transports, and was the sender, so far as appears from his evi-

dence, of that telegram. In your view, I gather that telegram would not constitute a valid requisitioning of the *Baron Ogilvy*? A. My view is, you must comply with the Proclamation under which the telegram purports to be sent.

Q. Would you agree that the Crown has at common law, general power of requisitioning British ships in times of national emergency? A. The Crown has a general power or prerogative of requisitioning any property within the realm in time of war for the defence of the realm. I do not go as far as to say it has power to requisition property out of the realm. That is a point on which I hold the view that the Crown have no power. I do not dispute the Crown has a power of requisitioning ships, but, of course, one has to remember that this power of requisitioning ships has really only been used to any extent in the present war. I think I have observed in the report of some case that some learned gentleman made research in the matter, and he showed that no ships had been requisitioned in the American War of Independence from 1775 to 1782, or in the war with France from 1793 to 1795, or from 1800 to 1804, or during the war with America in 1812, so that though I do not dispute that there is such a power, I would point out to you that the law about it has not come into question very much. I have taken these figures from the report of the case of the *China Mutual Steam Navigation Company, Limited, v. Sir Joseph Maclay Bart.*, in the Times Law Reports, Volume 34, Number 5, at page 83.

Q. Would you agree that the Crown, by its proper officer, assuming that a national emergency existed, could have validly requisitioned the *Baron Ogilvy* in this present case, she being in this country at the time? A. Yes, if the prerogative was exercised by an official duly authorized.

Q. We have had the particular official here, and he has given evidence. May I just tell you what he said, quite shortly as to that? He said he was the Director of Military Sea Transport. A. May I look at a copy of it?

Q. Yes. It is at the very beginning of his evidence. He said he was Director of Military Sea Transport, and at the time of the requisitioning of the *Baron Ogilvy* in April, 1915, he was Assistant Director (Military) to His Majesty's Director of Transports, and he said further that the Director of Transports was the head of that department of the British Admiralty, which deals with all questions of transport and requisition, that is to say, sea transport, under the direction of the Lords Commissioners of the Admiralty. In your view, would Mr. Foley be a person competent to exercise the prerogative of the Crown in respect of the requisitioning of this vessel? A. No, I think not. Mr. Foley describes himself as an Assistant Director (Military) to His Majesty's Director of Transports, and I understand that he is neither the secretary of the Lords Commissioners of the Admiralty, nor a flag officer of the Royal Navy, holding an appointment under the Admiralty.

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Q. Is it your view that the prerogative of the Crown, in so far as it entitles the Crown to requisition British ships, can only be exercised by the secretary of the Admiralty, or by a flag officer? A. Well, the Proclamation distinctly states that those are the persons who have authority to exercise it, and if there is no other authority shown in this case, my opinion is that an Assistant Director to the Director of Transports cannot exercise the Royal prerogative.

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Q. Is it your view that the Proclamation of the 3rd August limited the prerogative of the Crown

in any way, or limits the way in which it can be exercised? A. I think the Proclamation directs the manner in which the prerogative is to be exercised, but you must remember that it is not any official of the Crown who can exercise the Royal prerogative; we should get into a dreadful state of things if that were so. If you are going to exercise the Crown's prerogative you must have authority from the Crown; I suppose if you hold such a high office as Secretary of State and so forth, the authority would be presumed.

Q. Is it your view that a warrant would be required in order to the lawful requisition of a British ship? A. Under this Proclamation, certainly, but the form of the warrant would be, of course, another matter. I understand that the Admiralty in general comply with the Proclamation by issuing letters signed by one of the officials mentioned in the Proclamation, and that, of course, would be a very different state of things; in this case for some reason unknown, no letter was signed, and there is no other document except the telegram.

Q. The reason which was given was that it was a breakdown of departmental official routine. A. I am afraid that would not give a right to anybody to exercise the Royal prerogative, who had not got it otherwise.

Q. Have you ever seen one of these requisitioning letters, in fact? A. No, but I am not concerned to challenge the suggestion you make that a letter signed by one of these officials specified in the Proclamation might be his warrant.

Q. I was wondering whether it can be said that a warrant was required, a warrant with a capital "W," or a mere letter would be sufficient? A. I do not see the capital "W," nor do I think that the type used by the printer would have much effect on the construction of the Proclamation.

Q. You have not seen a warrant for the requisition of a British ship? A. I think not; I may have read one in a report, but I do not remember one, at any rate.

Q. Is it your view that these British owners of the British steamship *Baron Ogilvy* could have safely declined to put the *Baron Ogilvy* at the service of the government after the receipt of that telegram? A. Yes, I say that the Crown cannot take away private property except by a means which the law sanctions.

Q. I am not sure that it is a question for you, but do you think there is the slightest chance of the *Baron Ogilvy* not having been taken by the government, had the owners refused to allow her to go? A. The government do a number of things in times of war which cannot be justified under the law; you are asking the legal position.

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Q. I prefaced the question by saying I did not think it was a question for you. I dare say you know the Admiralty took this ship in fact, and used her? A. I take it from you. I do not know.

Q. Would that not be good enough as a requisition under the prerogative of the Crown? A. I do not think the Admiralty have power to go without more and take a ship. I do not know what you mean by the Admiralty; some official of the Admiralty, I suppose, went on board and took the ship; that is rather inconsistent with the only document I have read, the letter of April, but you put to me a hypothetical case, not this case, but a hypothetical case of the Admiralty sending down a man to take the ship without any warrant at all. It would depend upon who the officers were, but in my view that would in most cases certainly be illegal. The Crown have no power to take private property in that way; if it exercised its prerogative it must proceed by legal methods.

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Q. Supposing a charterer had brought an action in an English court against the owners of the *Baron Ogilvy* for failing to deliver the vessel to them, and the owners of the *Baron Ogilvy* replied with a plea that their vessel had been requisitioned by the government, and that they were prevented from handing her over to the charterers, would that, in your view, have constituted a good defence, having regard, of course, to the view you have expressed as to the invalidity of the requisitioning document?

A. The question in each case would be whether there had been a legal requisition, because nothing else, as I suppose, would entitle the ship owner to put an end to his contract with the charterer; it would be a question of fact in each case. I have given you my opinion on the facts of this case; there was no sufficient legal requisition to justify the owner in putting an end to his contract with the charterer.

Q. In your view, therefore, as I understand it, it would be necessary for the owners, in order to establish their defence, to prove that the taking of the vessel by the government, or the use of the vessel by the government, was a use to which the government was entitled? A. You are now rather leading me on to topics which I have not considered. My consideration has been limited to the question of what is a legal requisition under this Proclamation, or under the prerogative, and whether there was such a legal requisitioning in this case. You are now asking me questions about the law as between owners and charterers, I think.

Q. Perhaps I was, rather. A. I have not gone into that. You must remember I know nothing of the facts of this case beyond the two documents I have seen and the Proclamation on the points of law.

Q. You are aware, I have no doubt, that since the Proclamation of the 3rd August, many hundreds, I was going to say thousands, of British ships have been requisitioned? A. I will take it from you that they have; I have no knowledge of that.

Q. And many dozens, or a large number, of cases have been fought in the courts of this country in which the point at issue has turned upon the effect of requisitioning of British vessels by the British Government? A. I am not aware of any case in which the Court has had to consider the point that arises in this matter.

Q. You are not aware of any cases in which that point has ever been raised? A. I have not been shown any case in which the essentials of a valid requisition have been brought to the attention of the Court and decided; and, of course, you must remember when you tell me there are so many cases in which requisitioning has been done, that British ship owners are always only too anxious to help the government in time of war; they do not raise difficulties if they can help it; moreover, it is to their interest to keep on good terms with the Admiralty.

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Q. I did not suggest that cases might have arisen as between the owners and the Admiralty, but you are aware of no case in which the validity of the requisition which might have an important bearing upon a dispute between two private individuals has ever been raised? A. No case has been brought to my attention which has any bearing on the particular point upon which I am giving an opinion. I have read the evidence of Mr. Dunlop, and I do not find that he has given any authority for the view which he puts forward, except one case, I think it is in 1916 Probate. I have looked at that

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case, but it seems to me to have no bearing at all upon the matter.

Q. Was that *The Broadmayne*? A. Yes.

Q. Have you looked in the same volume at the case of *The Sarpen*, where a tug was requisitioned? A. No, but if you give me the report I will look at it. (Report handed.) I will take it from you that the case was one in which the ship had been requisitioned by telegram, and the question was whether she was a King's ship so as to be disentitled from getting salvage. Then I observe on the first page that that question of requisition was never questioned. The passage I have before me on page 307, which gives an account of the pleadings, says this: "The Plaintiffs"—and I suppose those were the people claiming salvage—"by their reply specifically admitted that the *Simla* was under requisition by the Admiralty, but alleged that the requisition did not amount to a demise of the Tug or a transfer of ownership to His Majesty, and that the Plaintiffs were not by the fact of such requisition, or at all, deprived of their right to remuneration for the services of the *Sarpen*." It is quite clear on the pleadings, it is admitted, there was a requisition, and no question arose about it.

Q. That was a case in which it would have been important for the plaintiffs to establish if they could, that the requisition was invalid, then there would have been no question of her being a King's ship at all? A. I do not know the facts of that case, but it does not follow from what you say that that is so. The ship might have been taken by consent by the Admiralty, and the same question would have arisen. Here you are asking about the power of the Admiralty to take a ship without consent, which is a different matter.

Q. I happened to be the pleader who admitted the requisition that you have been referring to. There was no question of her being taken with consent. A. I do not know the facts.

Q. I gather it to be your view that in order to excuse a ship owner from non-fulfilment of a contract through requisition by the British Government, he must show that the requisition upon which he relies, if that is what he relies upon, was a valid requisition? A. That again is rather off the point to which my attention has been directed. I can say this in answer to it, that I think the Crown have no right under the Proclamation or by the prerogative to compel a British subject to give up his ship or other property unless the requisition be made in ways authorized by law.

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Q. Just a question about the Courts (Emergency Powers) Act 1917. I dare say you are familiar with it. Section 3 of the act is the important one, and it provides: "Where before or after the passing of this Act the nonfulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government Department, or of a competent naval or military authority made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government Department with the object of preventing transactions which in the opinion of the Department would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract." Then it deals with evidence of the fact. I ask you to assume this, that the non-fulfilment of the charter-party on the part of the owners of the

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Baron Ogilvy was due to their compliance with a requirement of the British Admiralty, which is a government department. Would that in our English courts be a good defence? A. I have not considered this matter at all. My attention has not been called to this section before, but I should very much doubt whether that would authorize any action of a government department, although such action was entirely illegal. I observe when one comes to naval or military authorities, the section only applies if they are competent, which, I think, refers to those restrictions on the exercise of requisitioning and so on, contained in all the orders in council, and I think also in the Defence of the Realm Regulations.

Q. You observe it merely deals with orders or restrictions of any government department? A. Yes, I should have to consider it. I am not prepared offhand to give an opinion about that. I can hardly conceive that that means to authorize any action, although it is entirely contrary to law.

Q. The question would rather be this, would it not, whether in order to constitute a defence the defendant must show that the requirement with which he complied was a valid requirement? A. Yes.

Q. It is perhaps not fair to ask you much about this, but I thought I might call your attention to a recent expression of opinion, it is no more, by Mr. Justice Atkin, in a case which is reported in Lloyd's List on last Monday, of *A. E. Lawrence & Company v. Elias Buerger & Company*, where the learned Judge deals with that particular section of the Courts (Emergency Powers) Act, and he referred to an order which had been made by the Food Controller. There was a doubt thrown upon the legality of the order, and I think the

learned Judge came to the conclusion the order was illegal. This is what he says about it: "In these circumstances I am inclined to think that there would be protection even though the Government Department in question had no legal authority in fact for issuing this requirement, regulation or restriction. I do not think it necessary to go so far as to decide that matter in this particular case."

Then he goes on to deal with another aspect of it. A. The learned Judge reserved his opinion upon that, and I beg leave to reserve mine. I have not considered this question. I should be rather surprised if any action of any sort or kind by a government department was sufficient to deprive a British subject of his property.

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Q. That was not quite the point I was putting to you; it was if an illegal action of the British Government deprived a defendant of his power to comply with a contract with some other British subject, what would be the effect? A. That would turn on the question of construction, on which I desire to reserve my opinion.

Mr. Le Quesne: I have no questions to ask in re-examination.

Mr. Le Quesne: There have not yet been handed to me the documents or books of Messrs. Hogarth, which contain the conditions on which other vessels belonging to Messrs. Hogarth and this vessel were employed by the Admiralty. I desire to place this on record by way of explanation of any failure on my part to put to Mr. Dunlop, or to Sir Henry Erle Richards, any matters which may arise on these documents.

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(Counsel and solicitors agreed to waive the reading over to and the signature of this evidence by the witness.)

394

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libellant,

v.

HOGARTH SHIPPING COMPANY,
LIMITED, as owner of the Steam-
ship *Baron Ogilvy*, and HUGH
HOGARTH & SONS,

Respondents.

In Admiralty.

395

The depositions of witnesses taken *de bene esse* before D. S. Phlegar, a Notary Public for the City of Norfolk, in the State of Virginia, pursuant to notice hereto annexed, at the office of Messrs. Baird & Swink, Law Building, Norfolk, Virginia, December 9, 1916, to be read as evidence on behalf of the respondents in the above-entitled cause pending in the District Court of the United States for the Southern District of New York.

PRESENT:

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MESSRS. HAIGHT, SANDFORD & SMITH and HUGHES,
LITTLE & SEAWELL (MR. LITTLE), for the libel-
lant.

MESSEERS. KIRLIN, WOOLSEY & HICKOX and BAIRD &
SWINK (MR. BAIRD), for the respondents.

Stipulation: It is stipulated and agreed that this deposition may be taken by a stenographer and

Deposition of John Thompson—Direct.

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thereafter reduced to writing; that the stenographer's fees may be taxed as a disbursement in this cause; that signing, filing and certification of the deposition is waived, and a copy thereof to be served within a reasonable time on the proctors for the libellant.

JOHN THOMPSON, sworn as a witness on behalf of the respondents, testified as follows:

Examined by Mr. Baird.

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Q. State your name, occupation and your home?

A. John Thompson; master mariner; I was born in the County of Antrim, Ireland.

Q. How old are you, Captain, and how long have you been master mariner? A. I am fifty-two years of age, and I have been master mariner since 1898.

Q. When did you become master of the steamship *Baron Ogilvy*? A. Four years ago now; I forget the month.

Q. What is the flag of that vessel? A. British.

Q. Where is she owned? A. Ardrossan.

Q. Does she fly the British flag? A. Yes, sir.

Q. And are you a British subject? A. Yes, sir.

Q. Who is the owner of that ship, do you know? 399

Mr. Little: The question is objected to.

A. Hogarth Shipping Company.

By Mr. Baird.

Q. Do Hugh Hogarth & Sons own that ship, or have they any interest in her so far as you know?

A. Not so far as I know.

Q. You say the Hogarth Shipping Company, Limited, is the owner? A. Yes, sir.

Q. And that Hugh Hogarth & Sons own no interest in her so far as you know? A. So far as I know.

Q. Are they the agents for the vessel? A. They are the agents and managing owners.

Q. Where are they? A. 24 St. Enoch's Square, Glasgow.

Q. Where was the *Baron Ogilvy* in April of last year, April, 1915? A. London.

Q. London, England? A. Yes, sir.

401 Q. When she came into that port did she have cargo on board? A. Yes, sir.

Q. What? A. Oats.

Q. Consigned to whom, do you know? A. No, I don't know who they were consigned to; I forget.

Q. From what port were they shipped? A. Baltimore.

Q. What time in April, 1915, were you in London, do you recall? A. I could not say the date, but about the first part of April.

Q. Did you receive any orders while in London as to where the ship should go and to whom she was chartered?

Mr. Little: The question is objected to.

A. Yes.

By Mr. Baird.

Q. What orders did you receive?

Mr. Little: The question is objected to if they are in writing unless the writing is produced.

Mr. Baird: Counsel intends to produce all the papers in the possession of the witness.

A. I received orders that the ship was chartered by The Texas Oil Company from Port Arthur, Texas, to South African ports for a cargo of case oil.

By Mr. Baird.

Q. From whom did you receive these orders? A. From H. Hogarth & Sons.

Q. Were they in writing or given verbally? A. In writing.

Q. Have you got that writing? A. I could not say for certain.

Q. Did you receive any charter-party? A. Yes, 404
sir.

Q. Do you mean that the orders were in writing, or that the charter-party was in writing? A. The orders were in writing also saying the ship was chartered by The Texas Oil Company, and to proceed to Port Arthur and load for the South African ports, and also charter-party was enclosed.

Q. Will you make an examination when you return to the ship this afternoon, and if you have those orders, or the charter-party, produce them and file them with the notary in this case? A. Yes, sir.

Q. You can do that on Monday? A. Yes, sir.

Q. You say you received orders and a copy of the charter-party showing that your ship was going to Port Arthur and take a cargo of case oil to South African ports; is that right? A. That is right, 405
sir.

Q. And you say that if those orders are in your possession they are on the ship, and you will produce them and have them to the notary on Monday, this being Saturday? A. Yes, sir. It is possible that they have been mislaid. I have not seen them

for some time, but they ought to be in the ship somewhere.

Q. Did your ship enter upon the voyage from Port Arthur to South African ports? A. No, sir.

Q. Why not? A. She was requisitioned by the government.

Mr. Little: This answer is objected to as since this was the case the requisition is the best evidence, and it is called for.

Mr. Baird: Counsel is informed by the witness that he never saw the requisition papers, as they were served on the owners or the agents of the ship. Respondents' counsel is attempting to show what the master of the vessel actually did and upon what information and instructions he acted.

Mr. Little: The motion is renewed to strike out the answer for the reason that if the requisition was in writing it is the best evidence, and for the reason that it appears from the answer that the Captain's information in connection therewith is only hearsay.

By Mr. Baird.

Q. What government was she requisitioned by?

Mr. Little: Objected to.

A. The British Government.

By Mr. Baird.

Q. Were any papers showing the fact of requisition delivered to you, Captain? A. No, sir.

Q. How do you know that she was requisitioned? A. I was told by our superintendent.

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Mr. Little: The question and answer are objected to, and motion to strike the former answer is renewed.

By Mr. Baird.

Q. What orders did you receive from your superintendent?

Mr. Little: Objected to.

A. The only orders I received, they told me the government had requisitioned the vessel, and started putting wireless into her—fitting up a Marconi room.

410

Mr. Little: The answer is objected to and motion made to strike out.

By Mr. Baird.

Q. What was done to the ship? A. Wireless was put in and a Marconi room built. That was all that was done.

Q. Was that all that was done then? A. At London.

Q. Where were you directed to go? A. To New Orleans.

Q. Where did you go? A. To New Orleans.

Q. What was done to the ship upon your arrival there, if anything?

411

Mr. Little: Objected to.

A. She was fitted up for carrying mules.

By Mr. Baird.

Q. How was she fitted for that purpose?

Mr. Little: Objected to.

412

Deposition of John Thompson—Direct.

A. She was pierced and also fitted up with stalls throughout.

By Mr. Baird.

Q. What do you mean by "pierced"? A. Putting ports along between decks alongside of the ship.

Q. That was for the purpose of giving the animals light and air, I suppose? A. Yes, sir.

Q. How long did that work take?

Mr. Little: Objected to.

413 A. The fitting up about a week—a week to ten days.

By Mr. Baird.

Q. What cargo did you take on at New Orleans? A. Mules.

Q. How many? A. 804.

Mr. Little: Objected to.

By Mr. Baird.

Q. Where did you go? A. Avonmouth.

Mr. Little: Objected to.

By Mr. Baird.

414 Q. Avonmouth, England? A. Yes, sir.

Q. To whom was the cargo of mules consigned?

Mr. Little: Objected to.

A. To the government.

By Mr. Baird.

Q. Did you make delivery of the cargo? A. Yes, sir.

Deposition of John Thompson—Direct.

415

Q. To whom? A. To the government.

Mr. Little: Objected to.

By Mr. Baird.

Q. What did your vessel next do? A. Went back to New Orleans again.

Q. What cargo did she take? A. Mules.

Q. Where did she go? A. Avonmouth.

Q. Did she deliver the cargo? A. Yes, sir.

Q. To whom?

Mr. Little: Objected to.

A. To the government.

416

By Mr. Baird.

Q. What did she next do? A. Went to New Orleans.

Q. What cargo did she take? A. Mules.

Q. Where did she go? A. Avonmouth.

Q. Did she deliver the cargo? A. Yes, sir.

Q. To whom?

Mr. Little: Objected to.

A. The government.

By Mr. Baird.

Q. Where did you next go? A. New Orleans. 417

Q. For a cargo? A. Yes, sir.

Q. What cargo did you take? A. Mules.

Q. Where did you carry them? A. Avonmouth.

Q. Did you deliver them there? A. Yes, sir.

Q. To whom?

Mr. Little: Objected to.

A. The government.

By Mr. Baird.

Q. You said you carried 804 on the first voyage; how many did you carry on the three succeeding voyages? A. I carried 904 the last trip, 903 the trip before, 902 the trip before and 804 the first trip.

Q. How much time did these four trips that you have just described take?

Mr. Little: Objected to.

A. About six months.

By Mr. Baird.

419 Q. For whom were those trips made?

Mr. Little: Objected to.

A. For the government.

By Mr. Baird.

Q. What government? A. The British Government.

Q. Were they made under the requisition you speak of?

Mr. Little: Objected to.

A. Yes, sir.

420 *By Mr. Baird.*

Q. When those four trips were ended what did your vessel do?

Mr. Little: Objected to.

A. Proceeded to New York.

By Mr. Baird.

Q. There she took on cargo, I presume? A. Yes, sir.

Deposition of John Thompson—Direct.

421

Q. Where did she go? A. New Zealand.

Q. For whom did she load cargo in New York?
A. Standard Oil Company.

Q. Was there any representative of the British Government aboard your ship during the trips that you have spoken of?

Mr. Little: Objected to.

A. No, sir.

By Mr. Baird.

Q. You don't know what the terms of the requisition were, do you? A. No, sir.

422

Q. Was the compensation for the use of your ship paid to you or to the owners or agents of the vessel? A. I don't know anything about that, or whether there was any compensation.

Q. You simply received the ship's expenses and wages of master and crew from the owners or the agents? A. From the owners, yes, sir.

Q. You said those four voyages which you made for the British Government occupied about six months? A. Yes, sir.

Q. And from what you say you must have left London for the purpose of entering upon those voyages around the middle of April, 1915?

Mr. Little: The question is objected to.

423

A. Yes, sir.

By Mr. Baird.

Q. Was it possible for you to perform the charter with The Texas Company after the government requisitioned the ship? A. No, sir.

424

Deposition of John Thompson—Direct.

Q. Did the owners say anything on that subject to you—the owners or agents?

Mr. Little: Objected to.

A. No, sir.

By Mr. Baird.

Q. They simply told you that the vessel had been requisitioned? A. Yes, sir.

Mr. Little: The question is objected to and motion made to strike out.

425 *By Mr. Baird.*

Q. And directed you to perform this government service which you have described? A. Yes, sir.

Mr. Little: The question and answer are objected to and motion is made to strike out the answer.

By Mr. Baird.

Q. Where did you say the office of Hugh Hogarth & Sons was? A. 24 St. Enoch's Square, Glasgow.

Q. Have they any office in the United States, so far as you know? A. Not so far as I know.

426 Q. Where is the office of the Hogarth Shipping Company, do you know? A. 24 St. Enoch's Square, Glasgow.

Q. Have they any office in the United States, so far as you know? A. Not so far as I know.

Q. Did you have any knowledge of the making of the charter with The Texas Company until you received a copy of that charter while in London and were told to go to Port Arthur? A. No, sir.

Q. That was the first knowledge you had of it? A. That was the first knowledge I had of it.

Deposition of John Thompson—Direct.

427

Q. Do you know how many days elapsed between the time you were delivered a copy of the charter with The Texas Company and told to go to Port Arthur and the time you were told the vessel had been requisitioned and you must go to New Orleans? A. No, I could not say how many days it was, but it must have been four or five. To the best of my knowledge, it was four or five.

Q. Had your cargo been discharged when you received a copy of the charter with The Texas Company, and were told to go to Port Arthur? A. No, sir.

Q. Had you finished discharging when you were told the vessel had been requisitioned, and that you must proceed to New Orleans? A. No, sir.

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Q. Where did you say the *Baron Ogilvy* is registered? A. Ardrossan.

Q. Where is that? A. About twenty-five miles from Glasgow.

Q. In Scotland? A. Yes, sir.

Q. Is that her home port? A. Yes, sir.

Q. Do you remember when it was that you arrived in New York after the completion of these four voyages for the British Government which you have described? A. No, sir, I could not say for certain.

Q. Can you say approximately when it was? A. Yes, sir, I could. We left New York the 12th of December. We had been there about fourteen days. We called by Hampton Roads for coal, and went on to New Zealand.

429

Q. That means that you must have arrived at New York, after the completion of the four voyages for the British Government, in the latter part of November or the very early part of December, 1915, doesn't it? A. Yes, sir.

430 *Deposition of John Thompson—Direct—Cross.*

Q. Did you come straight to New York after completing your last voyage for the government? A. Yes, sir, after dismantling.

Q. You don't know anything about whether notice of the requisition of your ship was or was not given to The Texas Company, do you? A. No, sir.

Q. There was no reason why your ship could not have performed the charter with The Texas Company if she had not been requisitioned, was there? A. No, sir.

Mr. Little: The question is objected to as leading and suggestive.

431

By Mr. Baird.

Q. I mean by that that there was nothing in the condition of the ship which would have rendered it impracticable? A. No.

Cross-examination by Mr. Little.

Q. You know, Captain, that you did not enter upon this charter from Port Arthur to South Africa? A. Yes.

Q. And the vessel was fit and in condition to enter upon that charter at the time you were in London? A. Yes.

432

Q. Did you say that you had discharged or had not discharged, at the time you got notice to go on this voyage? A. I had not discharged.

Q. How long did you take after that to discharge? A. You might say a week.

Q. And you were discharged when you were informed you were going to be put in the government service? A. No, sir.

Q. You had not finished discharging then? A. No.

Q. Did you take any steps to call the government's attention to the fact that you were under charter? A. No.

Q. So far as you know, nothing was done to inform the government of that fact? A. So far as I know there was not.

Q. Do you know of any efforts being made by your owners or agents to get the vessel requisitioned? A. No, sir.

Q. What is the business of Hugh Hogarth & Sons, do you know? A. Ship owners and ship brokers.

Q. And you say the *Baron Ogilvy* is owned by the Hogarth Shipping Company, Limited? A. Yes, sir.

Q. Did you have any information or suggestion prior to the time you state you were told by the superintendent that the vessel had been requisitioned that she would be so requisitioned? A. No, sir.

Q. Do you know whether the owners made any efforts to have her withdrawn in order to comply with this charter? A. I do not know.

Q. If your vessel had left London upon the completion of your discharge of oats, she would have arrived in Port Arthur in time to have undertaken that charter, under normal conditions, would she not? A. Yes. Of course, I know that the owners fully expected to go to Port Arthur, because we were arranging about provisions.

Q. At what time did you arrive at Avonmouth from your first voyage from New Orleans? A. That I cannot exactly say. We were about six weeks on the trip. We made each voyage in about six weeks.

Q. What time did you leave London for New Orleans? A. That I can't say.

Q. Would you say it was the first half of April, 1915? A. About the middle of April, as near as I can judge.

436 *Deposition of John Thompson—Cross—Redirect.*

Q. And you say you did not get any papers or anything except the mere statement of the superintendent that your vessel had been requisitioned?

A. No.

Q. You never did get any? A. I never did get any.

Redirect examination by Mr. Baird.

Q. Do you know about the time you arrived in New Orleans on the first trip? A. No, sir, I can't say.

437 Q. How long would it take to run to New Orleans? A. It took, as a rule, seventeen or eighteen days.

Q. If, instead of going to New Orleans, you had gone to Port Arthur, would you have arrived at Port Arthur about the time you arrived at New Orleans, or would it have taken longer? A. It would have taken about one day longer.

Q. What did you say in answer to Mr. Little's question that the owners expected you to go to Port Arthur because of the provisions they put in? A. Yes, sir.

Q. What was that? I don't know that I caught your meaning. A. To make up my store list for the voyage.

438 Q. Who told you to make out the store list? A. The owners. It is a customary thing always to do. As soon as we find where we are going we make it out.

Q. Was the store list different from a trip to Port Arthur than it would be from New Orleans to Avonmouth? A. Yes, it would be different.

Q. And you say the owners had given a list to make out from Port Arthur to South African ports? A. Yes.

Deposition of John Thompson—Redirect.

439

Q. After the vessel was told to go to New Orleans, were the directions in that regard changed?

A. Yes, they were changed because during the time we were in the mule trade we provisioned mostly in New Orleans.

The further taking of depositions in this case adjourned until Monday morning, December 11, 1916, at the same place.

Office of Messrs. Baird & Swink,
Norfolk, Virginia, December 11, 1916.

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Met pursuant to adjournment of Saturday.

Present: Same parties as heretofore.

JOHN THOMPSON, being recalled for further examination on behalf of the respondents, testified as follows:

Examined by Mr. Baird.

Q. Captain, did you, upon your return to the ship, find the copy of the charter-party between the owners of your steamer and The Texas Company, to which you referred in your testimony on Saturday? A. Yes, sir.

441

Q. Will you please look at the charter-party or paper which I now hand you, and say whether or not that is the document which you received from your owners while you were lying in London in respect to the trip you have testified you were directed to make from Port Arthur to South African ports? A. Yes, sir. This is the charter-party I received from London.

Note: The charter-party is offered in evidence in this case and is marked "Exhibit No. 1"; the same is forwarded as a part of this deposition.

Q. In your testimony on Saturday you said that you got some orders in writing from your owners in regard to the voyage mentioned in this charter-party? A. Yes, sir.

Q. That is the voyage from Port Arthur to South African ports? A. Yes, sir.

443 Q. When you returned to your vessel on Saturday night were you able to find those orders? A. No, I could not find them.

Q. What has become of them, Captain? A. They have been destroyed.

Q. You do not know how they came to be destroyed, or who destroyed them, do you? A. I think that they were thrown overboard. It was in a letter, and the charter-party was enclosed in a letter where the charter-party was, and I keep the letters for a while and then throw them overboard.

Q. That is your common practice, is it, with regard to letters? A. Yes, sir.

Libelant's Exhibit 1.

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NOTE.—This is a charter-party dated April 14, 1915, between J. H. Winchester & Co., agents for the owners of the British steamship *Vimeira*, and the libelant, The Texas Company, whereby the libelant hired the *Vimeira* for a voyage from Port Arthur, Texas, to a port between Cape Town and Delagoa Bay, both inclusive, with a cargo of 220,000 cases, 10% more or less, of 10 American gallons each, of refined petroleum, for the hire of Sixty-six cents (66c) per case, for one port discharge, the vessel to load between April 15, 1915, and May 15, 1915.

The charter-party was produced at the trial and offered in evidence in response to the respondent's First Interrogatory annexed to the answer and calling for the charter-party of the vessel hired by libelant to carry the cargo mentioned in the libel.

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Libellant's Exhibit 2.

Form N Y 52—1—15—1M

STEAM

THE TEXAS COMPANY**PETROLEUM AND ITS PRODUCTS****GENERAL OFFICES**

Houston, Texas

EXPORT DEPT.

17 Battery Place, New York, N. Y.

449

(D. B. Dearborn & Co. Steamship Brokers and Ship Agents 8 Bridge Street, New York.)

(J. H. Winchester & Co. Inc. Steamship Agents and Ship Brokers Produce Exchange, New York)

450

THIS CHARTER PARTY, made in the City of New York, the 6th. day of February 1915. BETWEEN J. H. Winchester & Co., Inc., by cable authority of Messrs. I. B. Pearson & Co., of Glasgow, Agents for Owners of a first class Steam-vessel owned by Messrs. Hugh Hogarth & Sons of Glasgow and name of vessel to be declared on or before March 10th, 1915 classed 100 A. 1. at British Lloyds or its equivalent and to be so maintained during the service, of the burthen of net tons, or thereabouts, register measurement, now
 of the first part and THE TEXAS COMPANY, of the second part,

WITNESSETH that the said party of the first part agrees on the freighting and chartering of the whole of the said vessel, (with the exception of the deck, cabin and necessary room for the crew and storage of provisions, fuel, sails, tackles and cables),

unto the party of the second part, for a voyage from Port Arthur, Texas, to a port between Cape Town and Delagoa Bay both inclusive on the terms following:

1. The said vessel shall be tight, staunch, strong and in every way fitted for such a voyage, including proper ballast, and dunnage, and shall receive on board for the aforesaid voyage a full cargo of REFINED PETROLEUM, in charterers' customary low top cases of ten American gallons each, which the said party of the second part doth engage to provide and furnish; the vessel's capacity being guaranteed to be 210,000 cases, 10 per cent. more or less. Charterers guarantee measurement of Refined Oil cases not to exceed two cubic feet, but Charterers have privilege of shipping larger cases, freight to be calculated at a rate per cubic foot equal to one-half of rates per case expressed in Clause 2. 452

2. The said party of the second part agrees to pay to said party of the first part, or Agents, for the use of said vessel during the voyage aforesaid: 47c Forty seven cents for one port discharge, all in United States Gold, on each and every case delivered, whether full, part full, or empty, payable upon correct delivery of cargo at the Port of Discharge, in approved thirty days' sight bills on London at the rate of \$4.80 gold to the £ sterling. 453

3. The Charterer shall have the privilege of shipping general cargo (including Petroleum and/or its products in barrels and/or cases and/or drums and/or crates and/or Turpentine in cases and/or drums) up to 40% of vessel's capacity; the rate of freight per cubic foot on such cargo to be half of the rate of freight per case expressed in Clause 2.

4. No goods or merchandise, except from the said party of the second part, or their Agents, shall be laden on board the vessel without written consent.

5. The vessel shall haul to such unloading berth or berths (where she can lie always afloat, in safety), as may be designated by the Charterers, or their Agents, but, if ordered to haul more than once, the Charterers shall pay all subsequent towage.

455 6. It is agreed that the lay days for loading shall be (if not sooner dispatched) at the average rate of 10,000 cases per running day; Sundays and Holidays excepted, commencing twenty-four hours after the receipt by the Charterers, or their Agents, of written notice that the vessel is ready to receive cargo, with one working day additional to clear at the Custom House. Time occupied shifting ports and/or berths or detention caused by ice, fog, floods, strikes, lockouts or other causes beyond Charterers' control not to count as lay days. The vessel to receive cargo on clearing day, if required by the Charterers, or their Agents, free of claim for demurrage. The cargo to be discharged with customary dispatch for steam vessels

456 7. The Master shall endorse upon the Charterers' copies of this charter party, the number of lay days not consumed at the port of loading and the same shall be allowed to apply on time for discharging at the port or ports of discharge.

8. The lay days for loading are not to commence before April 15th, 1915, except with the consent of the Charterers or their Agents, and if the vessel is not ready to load by two o'clock, P. M. on May

15th, 1915, the Charterers shall have the option of cancelling or maintaining this charter, their decision to be given at once, if the vessel be then at the loading port; but, if the vessel has not then arrived, their decision need not be given until 24 hours after arrival.

9. For each and every day's detention by default of the said Charterers, or their Agents, demurrage shall be paid by the Charterers or their Agents, to the Owners, or their Agents, at the rate of Four (4) pence, British Sterling, per net ton, per like day.

458

10. The cargo to be received and delivered alongside, within reach of the vessel's tackles, where she can lie afloat and in safety.

11. The vessel to be loaded under the usual stowage inspection, if required by the Charterer free of charge to the vessel for such inspection.

12. Vessel's stevedore, for loading and discharging, to be approved by the Charterers or their Agents.

13. The Master to sign Bills of Lading for the cargo at the current rate of freight, if required, without prejudice to this Charter Party. If the aggregate be below the Chartered rate, the difference to be paid by the Charterers or their Agents, in cash, at port of loading, less Insurance. If the aggregate be above the Chartered rate the difference, if not exceeding \$100, to be settled in cash by the Master; if more, by his draft in the Charterers' favor upon the Consignee, payable five days after the arrival of the vessel at the port of discharge.

459

Any such difference to be adjusted before the vessel clears at the Custom House. The Master to call at the Shipper's office to sign Bills of Lading when required.

14. The Charterers' responsibility shall cease when the cargo is all on board and Bills of Lading signed, but the Master and Owners shall have an absolute lien on the cargo for the freight, dead freight or demurrage.

461

15. Funds for the vessel's disbursements (not to exceed one-half of the estimated freight), if desired by the party of the first part, or their Agents, to be advanced by the Charterers on account of the freight to the Master at the port of loading, Master paying 3 per cent. on the amount advanced to cover Insurance and all other expenses; but the Charterers not to be responsible for the due appropriation of the advance by the Master. Such advance to be deducted, in all cases, from the freight earned under this Charter Party, and the Master shall so receipt the advance on the Bills of Lading.

462

16. An address commission of $2\frac{1}{2}\%$ upon the gross amount of freight is to be paid by the vessel and owners to The Texas Company upon completion of loading.

17. Steamer to apply for Cargo and Custom House business to Charterers' Agents at port of loading, paying them the customary fee of Ten Guineas.

18. The vessel to be consigned inward at the port or ports of destination to the Charterers' Agents, paying them the customary attendance fees for attending to the vessel's inward business.

19. The hatches to be opened during the voyage for the purpose of ventilation in fine weather, but only during midday hours.

20. The vessel shall proceed with all possible dispatch to the port of destination, via Cape of Good Hope; with liberty of touching for coal at the different coaling stations customary on that route, but not to remain there longer than is required for coaling; also to tow and to be towed, to assist vessels in all situations and to sail with or without pilots.

21. Should the vessel put into a port of distress, or be under average, she is to be consigned to Charterers, or their Agent or Agents, paying him or them usual charges and commissions, and in case a General Average statement be required, the same is to be adjusted at New York by adjusters to be appointed by the Charterers, who are to attend to the settlement and collection of the average, subject to customary charges; General Average, if any, to be adjusted according to York-Antwerp Rules of 1890, and as to matters not therein provided for, according to the usages and customs of the port of New York. 464

22. This Charter Party shall be subject to the Maritime Rules of the New York Produce Exchange, and any disputes at the port of loading between the Captain and the Charterer shall be settled by arbitration before the Committee on Maritime Affairs of the New York Produce Exchange, whose decision shall be final and binding upon both parties. 465

23. It is also mutually agreed that this Charter Party shall be subject to all the terms and provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States

of America, approved on the 13th day of February, 1893, and entitled "An Act relating to navigation of vessels, etc."; and Bills of Lading to be issued in conformity with such Act.

24. A commission of $2\frac{1}{2}$ per cent upon the gross amount of this Charter is due to J. H. Winchester & Co., Inc., by the vessel and Owners, upon signing of this Charter Party, of which $1\frac{1}{4}\%$ to Messrs. D. B. Dearborn & Co.

467 25. To the true and faithful performance of all and every of the foregoing agreements, we, the said parties do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the vessel, freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated freight under the within Charter.

Charterers have the option of ordering steamer to discharge up to five (5) ports in all, in which case rate of freight is to be $\frac{1}{2}c$ per case extra for each additional port used on the entire cargo, and said ports to be between Cape Town and Delagoa Bay both inclusive. Ports of discharge are to be in geographical rotation. Steamer is to be free of wharfage at port of loading. Steamer's draft not to exceed 24 feet at port of loading.

468 All Bills of Lading given for cargo shipped under this charter party the charterers undertake and agree shall contain the following clause:

"The ship in addition to any liberties expressed or implied herein shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages or otherwise howsoever given by His Majesty's Government, or any Department thereof, or any person acting or purporting to act with the authority of His Majesty

or of His Majesty's Government or of any Department thereof, or by any committee or person having under the terms of the War Risks Insurance on the ship the right to give such orders or directions, and nothing done or not done by reason of such orders or directions shall be deemed a deviation."

Should charterers fail to insert said clause Master shall have the right to refuse to sign such Bills of Lading.

VOYAGE CHARTER—Special Clause.

It is a condition of this charter and the charterers undertake that:—

470

(1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.

(2) The ship shall not be used nor be documented in any such way nor shall she carry any such cargo or any cargo so documented as would expose her to seizure or condemnation by Great Britain or any of her Allies.

(3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association in which the ship is entered. The warranties now contained in such policies are as follows:—

471

(a) That the ship shall comply, so far as possible with the orders of His Majesty's Government and the directions of the Committee as to routes, ports of call and stoppages.

(b) That the ship shall not start on the voyage if ordered by His Majesty's Government not to do so.

(c) That the ship shall leave an enemy's port within the days of grace allowed by the enemy and shall comply with the terms of any pass granted by the enemy.

(d) That the ship shall not enter or leave, or attempt to enter or leave, any port which is known to be blockaded by the enemy.

473 Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.

The above clauses to be incorporated in all bills of lading.

IN WITNESS WHEREOF, we have hereunto set our hands, the day and year first above written.

By cable authority of Messrs. I. B. Pearson & Co., dated Glasgow, February 6th, 1915.

(Sgd.) J. H. WINCHESTER & CO., INC.

A. J. MOURIS, Secretary.

(Sgd.) THE TEXAS COMPANY,

Export Department.

W. B. KNIGHT, Asst. Mgr.

Signed in the presence of

(Sgd.) WALTER JOHNSON

(Sgd.) MELVIN D. GREER

We hereby certify that the foregoing is a true copy of Original Charter Party now on file in our possession.

J. H. WINCHESTER & CO., INC.

J. B. SMULL,

Vice-President

Libellant's Exhibit H. E. R. 1.

475

s. s. *Baron Ogilvy.*

I, Sir Henry Erle Richards, reside at 25 Queen's Gate, London, and my professional chambers are at 4, Temple Gardens, Temple.

I was called to the Bar in 1887 and was appointed one of His Majesty's Counsel in 1905. I have a considerable practice in the Privy Council and in the Prize Court. I am also Professor of International Law in the University of Oxford. I was for some years Legal Member of the Viceroy of India's Council. I have devoted considerable attention to such questions as the Prerogative of the Crown in time of war.

476

My attention has been called to the Proclamation of 3rd. Aug. 1914; to the telegram signed "Transport" dated 10th April 1915; and to the relevant portions of the evidence of Mr. Foley.

The question put to me is whether the telegram is a sufficient requisition of the *Baron Ogilvy*. To that question I answer, "No, it is not." The telegram on the face of it purports to be founded on the Proclamation and one is thrown back therefore to the terms of the Proclamation itself. Now that Proclamation provides for the exercise of the royal prerogative and prescribes the mode in which it is to be exercised. It declares that the prerogative is to be exercised by warrant under the hand of the Secretary of the Lords Commissioners of the Admiralty or under the hand of any Flag Officer of the Royal Navy holding an appointment under the Admiralty. These two provisions are put in for a double purpose, they facilitate the exercise of the prerogative and they give the protection to the subject of the authority of an official of the specified rank.

477

The practice of the Office, according to Mr. Foley, is to send a letter supplementing any telegram, and that letter is apparently signed by the Secretary of the Admiralty or some other official qualified to do so under the Proclamation, and such a letter may well be a warrant within the terms of the Proclamation. But in this particular case, owing to a mistake of the office, there was no such letter and nothing more than the telegram. It follows that there was no valid requisition since the telegram did not comply with the requirements of the Proclamation. The letter of 15th April which has been shown to me does not help matters. It is said that the requisition by the telegram may be justified under the Prerogative, even if it be not sufficient under the Proclamation; but I do not agree with this view. The telegram as I have pointed out purports to derive authority from the Proclamation and not from the prerogative alone. Moreover it is not within the power of any official in the employment of the Crown to exercise the prerogative, he must be an official of high rank or an official specially authorised. Mr. Foley of himself without special authority could not exercise the prerogative and as I have pointed out he did not purport to do so. I have read the evidence of Mr. Dunlop and regret that I cannot agree with his opinion on this point.

Respondents' Exhibit S. C. H. 1.

481

Copy Charter-Party of the *Baron Ogilvy*. (See Libelant's Exhibit 2.)

Respondents' Exhibit S. C. H. 2.

(NOTE: The letters and telegrams are arranged in chronological order, rather than in the order marked by the Commissioner.)

A-1.

25th March 1915.

482

Copy.

Captain John Thompson

S S *Baron Ogilvy*

C/o Messrs Galbraith Pembroke & Co
London

Dear Sirs

We are in receipt of your letter from Baltimore dated 3rd instant. The American Mails are exceedingly irregular, and doubtless we shall receive your subsequent letters shortly.

We note particulars of passage to Baltimore. We had advice of your sailing on the 10th with 39950 qrs Oats. This is of course worse than last voyage and most disappointing. You will doubtless be advising us in your sailing letter on what basis of cubic ft to 20 cwt. We do not know how this works out, but it looks like about 74'.

483

We have of course been greatly disappointed at your being ordered to London as we should have much preferred your going to the Southern French ports and getting out of the submarine area as well

as avoiding the very great risk of being requisitioned for Admiralty service. We are very much afraid of this latter, as at present the Admiralty are urgently in need of vessels of your type for their Mediterranean expedition.

You are declared under an open charter for a cargo of Oil from Port Arthur, Texas to the Cape ports. The copy of the charter is enclosed herewith, and if you are visited by any Government Officials you can inform them that the vessel is chartered from the States to the Cape and if necessary exhibit the charter party. Messrs. Galbraith will be your Agents and make all arrangements. We trust that it will be possible to discharge you by elevator and get good despatch such as some local vessels have got in London recently with bulk Oats cargoes. We hope you will get right up to a berth and not be kept waiting at Gravesend. We trust there will be no changes in your personnel. In this respect matters are worse than ever, and your present Officers and Engineers will require to be put on current level.

We intend dry docking you in London if a dock can be obtained, but we have not decided whether to send you to Cardiff for bunkers or to bunker you in London for Newport News.

Yours truly

Sd H. HOGARTH & SONS

A.

S/S Baron Ogilvy

Purfleet.

28th March, 1915.

H. Hogarth & Sons

Dear Sirs,

We arrived here at 10 a. m. yesterday after a rather hard passage. Strong easterly winds from the Banks right up to the Channel. Saw no submarines but I believe there were some around. 488

We have only about 40 tons of bunkers on board. Came across a lot of that Liverpool Slack on the way across which burned away very fast. Being no orders at Gravesend I wired you from here to know who the agents were, got your reply and got in communication with them and they hope to take us up tomorrow. I received your letters of the 25 and 28th inst with oil charter party inclosed from Port Arthur, Texas to the Cape Ports, also my account for last voyage and cheque for £56.19.3. which is correct only you have credited me with cash to apprentices and Lascars and charged me with cash from Cullifords which I have in this voyages account. I will keep the account till I get same deducted from this voyages account. The 489
Officers and Engineers have all agreed to remain in the ship without informing them about the raise of pay. The mate asked me if he could bring his wife on board. I consented although no doubt it will cause trouble with the steward as he is a man who does not want to do any more than is really necessary. I have not asked him if he intends remaining but I think he does. I was greatly de-

ceived in the 2nd Mate Douglas. Third Mate Fowlie is all right and I would give him a Second Mate's berth any time. Mate you know all about him. He has not got sufficient men and he thinks you ought to give him a command. He and the steward have got the knife in each other; one making complaints about the other privately. I think if we are going for a long voyage it would be almost advisable to shift one or the other. However it is immaterial.

I note what you say about bunkers in calling at Newport News on the passage out would just lengthen the passage about 630 miles as no doubt we would make as good a passage to the hole in the wall in the Bahamas as we would to Newport. However, the time from the Lizards to Cardiff and back to the Longships is to be taken off that. The Vessel does not get along as well as she did for the revolutions; she must be getting a little foul.

In the event of the 2nd Mate Douglas wanting a holiday or wanting to bring his wife on board what shall I do in the matter? Please inform me in tomorrow night's letter. He would not be much of a loss. Shall I pay off and take the new articles out here or leave it to Cardiff, if we are going there. We might have very little time at Cardiff.

No more at present I must go to post.

Yours truly,

(Signed) JOHN THOMPSON.

P.s. My sailing letter from Baltimore a/c and vouchers went on shore with the pilot at Cape Henery. No doubt you will get it in time. J. T.

B-1.

Copy.

30th March 1915.

Captain John Thompson
S S *Baron Ogilvy*
London

Dear Sir,

We are to-day in receipt of your letter of the 28th instant. So far as we know you are still at Purfleet and Galbraith's still unable to say when you will get into dock. They inform us that you will probably be ordered to Millwall Dock. We hope wherever you go you will get an elevator and a decently rapid despatch.

494

We note what you report regarding Officers and Engineers. Of course you will inform them of the advances of wages as they will soon be informed as to what is current in that respect. We do not fully understand your allusion to Douglas, Second Officer, Has he not turned out satisfactorily? We certainly cannot allow a junior Officer to have his wife on board. In fact, it is an exception for the Mate to have this privilege. With regard to the First Officer and Chief Steward we will allow matters to take their course in the meantime.

495

You have of course been a long time out of dock and it is surprising that the vessel has kept as clean as she apparently has done. We are endeavouring to arrange for docking in the Thames but fear there will be some difficulty as there has been a pressure for dry docks in London. We have practically decided for you to come to Cardiff for bunkers and go from there straight to Port Arthur.

If any of your men want a run off for a few days let them away from London as there will be no time in Cardiff. Our present intentions are to send you from the Cape Ports to Australia for bunkers and load home under contract from Pagoumene (New Caledonia) to Glasgow.

We do not rightly see how matters are to be arranged with your native crew, but at the present moment we are up against so many complications that we need not cross bridges before we come to them. Let us however have your views on the subject.

Yours truly

Sd H. HOGARTH & SONS

P. S. Mr. Hutchison or Mr. Robertson will go to you when you get into dock and get started discharging.

B.

Copy Telegram.

Glasgow
31 March 1915.

To HOGARTH GLASGOW

Admiralty Note *Baron Ogilvy* in London may require requisition her please post plan say when expect discharged

EVENHANDED

C.

Copy.

31st March 1915.

Messrs Harley & Co
London

Dear Sirs,

S S Baron Ogilvy

We have your telegram of date from which we take it that the Admiralty have apparently been questioning you regarding this vessel. Please point out to the Admiralty that we have already with the *Baron Jedburgh*, eight vessels on Government service, a larger proportion of our tonnage than we are entitled to give, and that besides, this steamer is chartered for a cargo of oil from the States to the Cape Ports and thereafter from New Caledonia to the U. K. Continent. We cannot say when she is likely to be discharged.

500

Yours faithfully

Sd H. HOGARTH & SONS

P. S. We are not therefore sending you plan.

D.

501

Admiralty Shipping Agency,
34 Leadenhall Street,
London, E. C.

1st April 1915.

Dear Sirs,

We are instructed by the Director of Transports Admiralty, to inquire as to the positions of say two

502

Respondents' Exhibits.

of your vessels nearest approaching readiness U. K. to commence work on Government Service, if required, and capable of carrying from about 4,000 to 6,000 tons, measurement, of hay. They will be required on this Service for some weeks, and as the next vessel is wanted to commence loading at Belfast on the 6th inst or as soon after as possible, we shall be obliged if you will kindly send us a wire, on receipt, for the information of the Admiralty Authorities.

Yours faithfully

Sd HOGG & ROBINSON

503

Messrs. Hugh Hogarth & Sons
24 St. Enoch Square
Glasgow.

E.

Billiter House
Billiter Street

London E. C. April 1st 1915

Admiralty Dept.

504

Messrs. Hogarth & Sons
Glasgow

Dear Sirs,

S S Baron Ogilvy

We are in receipt of your favor of yesterday's date and note what you say.

The Admiralty have not today referred further to this steamer, but should they do so we must ask you to be good enough to give attention to their demands, although it is perhaps unnecessary for us to say that.

The fact of this steamer already being chartered from States to Cape and thence from New Caledonia @ U. K. cannot be of real concern to the Admiralty, if the needs of the country require your steamer, and we do not think the charterers of these cargoes you mention can have any possible claim if the Government of this country chose to use your boat for the urgent needs of the present time.

506

We note you are not sending us plan, but should later on we be requested to ask you for one, we hope you will kindly send it.

Yours faithfully

HARLEY & CO

C-1.

24 St. Enoch Square, Glasgow,
2nd April 1915.

Messrs. Hogg & Robinson,
Admiralty Shipping Agency Dept.
34 Leadenhall Street,
London.

507

Dear Sirs,

We received by late post today your letter of yesterdays date. The Director of Transports is aware that we have heavy contracts with the Tharsis Co. and the United Alkali Co for the carriage of Copper Ore, at rates ranging from about 40 to 60

508

Respondents' Exhibits.

per cent. of the current rates, to carry out, and which owing to the requisitioning of our handy vessels are at the present moment about 27,000 tons behind in delivery.

Consequently if you will communicate with the Director of Transports, we think you will be informed that owing to the circumstances which were put before him in consequence of the recent requisitioning of the *Baron Yarborough* and the *Baron Kelvin* both of our vessels were immediately released, you will be informed that no further services of our small steamers will be required from us.

509

Yours faithfully

Sd A HOGARTH & SONS

F

Copy.

2nd April 1915.

Messrs Harley & Co.,
London,

510 Dear Sirs,

S S Baron Ogilvy

We have your favor of yesterday's date. We have heard nothing from the Admiralty, and it looks as if they would leave this vessel alone.

Small Tonnage. We have to-day had a letter from Messrs Hogg & Robinson asking us to wire them what handy tonnage we could give them for carrying hay 4000 to 6000 tons measurement We did

Respondents' Exhibits.

511

not wire them as the letter was late of arriving, but we told them that if they consulted the Director of Transports they would be informed that he was aware of our heavy commitments which the handy vessels we had left were barely able to cope with, and that we had reason to believe that no more of our handy vessels would be asked for.

Yours faithfully,

Sd H HOGARTH & SONS.
M. P. M.

512

G.

Admiralty Shipping Agency,
34 Leadenhall Street,
London, E. C.

3rd April 1915.

Dear Sirs,

We thank you for your letter of the 2nd inst.,
You refer to "Handy" vessels as being necessary to be retained by you. The Government requirement, however, as we mentioned, is for vessels to carry 4/6000 tons of hay. Kindly reply further, therefore, on this basis and oblige.

513

Yours faithfully

Sd HOGG & ROBINSON.

Messrs. H. Hogarth & Sons,
24 St. Enoch Square,
Glasgow.

D-1.

Copy.

24 St. Enoch Square,
Glasgow.

6th April, 1915.

Messrs. Hogg & Robinson,
Admiralty Shipping Agency,
34 Leadenhall Street,
London.

Dear Sirs,

515

We have today received your favor of the 3rd inst.

Your letter of the 1st inst asked for tonnage capable of carrying 4000 to 6000 tons measurement of Hay, by which we understood, tons of 40'. We note however you require vessels to carry 4000 to 6000 tons of Hay.

We have no vessels of this type in or shortly due in this Country with the exception of s s *Baron Ogilvy*, now in Millwall Dock. This vessel is, however, chartered to load in the States.

Yours faithfully,

Sd H. HOGARTH & SONS.

516

H.

Admiralty Shipping Agency
34 Leadenhall Street,
London, E. C.

7th April 1915.

Dear Sirs,

We are much obliged for your letter of the 6th inst which however we cannot quite understand as our inquiry—shown in both ours of the 1st and 3rd instant, to which you refer was in respect of a vessel or vessels each capable of carrying 4000 to 6000 tons, measurement (i. e. 40 cubic feet) of hay.

518

The s s *Baron Ogilvy* is suitable for this requirement and we shall therefore be glad if you will kindly keep us posted as to her position and when her discharge will be completed as it is quite possible by that time that it will be found necessary to requisition her for Government service for the purpose we have named. We understand from the Milwall Dock Authorities that she will possibly be clear by Wednesday next.

Yours faithfully,

519

Sd HOGG & ROBINSON

Messrs. Hugh Hogarth & Sons,
24, St. Enoch Square,
Glasgow.

520

Respondents' Exhibits.

I.

Copy Telegram.

1 h 45 London G. 43

Glasgow,

9th April, 1915.

Received at 2.16.

HOGARTH G L W

521 *Baron Ogilvy* Referring to Admiralty Notice Requisition We believe could induce them take her instead for three or four trips New Orleans Avonmouth or Liverpool Fourteen pounds namely Thirteen pounds ten and ten shillings gratuity. Shall we try to do so.

EVENHANDED FEN.

J.

Billiter House,
Billiter Street.
London, E. C.

April 9th 1915.

522

Admiralty Dept.

Messrs. H. Hogarth & Sons,
Glasgow.

Dear Sirs,

S. S. Baron Ogilvy

With reference to notice of requisition by the

their purpose just as well if they were to charter her for voyages from New Orleans to Avonmouth or Liverpool for Mules, at £13. 10. 0. and 10/- gratuity for three or four trips and we believe if you were to authorise us to approach them that we could arrange this matter.

The conditions of course would be the same that are obtaining in the case of your other steamers running under charter to the Admiralty for this mule business.

We await your views on the matter.

Yours faithfully,

524

HARLEY & CO.

K.

Copy Telegram.

Glasgow 9th April 1915

Handed in at 1.13 p. m. Received here at 1.54 p. m.
London G

To HOGARTH, Glasgow.

525

Baron Ogilvy We regret to inform you Admiralty say must requisition this steamer for Countrys need Telegram of Requisition is being prepared and you will receive same later.

Sgd. EVENHANDED FEN

L.

Copy.

9th April 1915.

Messrs. Harley & Co.
London.

Dear Sirs,

s. s. Baron Ogilvy.

527 We have received your two telegrams of this afternoon and we confirm our telegram in reply.

We have intimated to Hogg & Robinson that the vessel is committed for further business but probably the requisitioning arrangement which you refer to will be that of another department and it will be as well to make them clear, that the vessel is fixed for oil from the States to the Cape and thereafter from New Caledonia home. Meantime, of course, we have not received a requisitioning telegram and cannot move in the matter.

Yours faithfully,

(Sgd.) H. HOGARTH & SONS.

M.

BILLITER HOUSE,
Billiter Street,
London, E. C.

April 9th 1915.

Admiralty Dept.

Messrs. H. Hogarth & Sons.
Glasgow.

Dear Sirs,

530

s. s. Baron Ogilvy.

We are sorry that we have had to advise you to-day that the Admiralty inform us they require this steamer for the needs of the Country.

A formal telegram of requisition is being prepared and you will receive it in due course.

It is very regrettable that the Admiralty requirements are such that they must have this steamer seeing the many other boats of yours they have requisitioned, but apparently the position cannot be helped.

We believe you will appreciate that our Government would not needlessly disturb any steamer's commitments if they could avoid it.

531

Yours faithfully,

HARLEY & CO.

M-1.

Copy of letter addressed to The Director of Trans-
ports.

9/4/15.

Sir,

*S. S. Baron Ogilvy.**Now London Expected discharged Monday.*

533 With reference to your verbal notice of requisitioning this steamer, we beg to say that if it would suit your purpose equally well to charter her for four trips from New Orleans to Avonmouth or Liverpool for the conveyance of Mules, that owners would be agreeable (you nevertheless remaining responsible for any third party claims as under requisition) to undertake that employment on being paid freight at the rate of £13. 10. per head of mule put on board, plus 10/- gratuity on the number landed alive.

Owners undertake all the fittings, foddering, electric light wireless telegraphy, to supply attendants etc. in the usual manner as they are doing in the case of the other "Baron" steamers at present under your employment, and they would do their best to carry out this work to your satisfaction.

534 In the event of your agreeing to this proposal the steamer would fit up at New Orleans to carry as much mules as possible under the supervision of your Officer there.

If this suggestion meets your approval we shall be glad of an early reply owing to the prompt position of the steamer in order that owners may make the necessary arrangements.

We are, sir,

Your obedient servants,

Sd. HARLEY & CO.

N.

Billiter House,
Billiter Street,
London, E. C. April 9th 1915.

ADMIRALTY DEPT.

Messrs H. Hogarth & Sons
Glasgow.

Dear Sirs,

S S Baron Ogilvy

536

Since writing we have your telegram and note contents.

We do not know why Messrs. Hogg & Robinson should trouble you.

The department they follow is quite distinct from the department we are following.

We understand the requisitioning of the *S S Baron Ogilvy* is absolute, and under the conditions of requisition you will note that the owners are indemnified against third party claims.

We enclose you copy of requisition terms recently arrived at in case you have not already received one, and we have already pointed out to the Admiralty, earlier to-day, that this steamer is under commitment for other employment but they replied they could not help that as they required the boat and that any claims that might subsequently come forward would have to be met in the usual manner.

537

Yours faithfully,

HARLEY & CO.

538

Respondents' Exhibits.

O.

Copy Telegram.

Glasgow April 10th 1915.

S/48 O H M S ADMIRALTY London

HOGARTH GLASGOW S S *Baron Ogilvy* is requisitioned under Royal Proclamation for Government service

TRANSPORTS.

539

E-1.

24 St. Enoch Square,
Glasgow,
10th April, 1915.

Messrs. Hogg & Robinson,
Admiralty Shipping Agency,
London. E. C.

Dear Sirs,

S S Baron Ogilvy

540

We have duly received your favor of 7th instant.

The information you have received respecting this vessel from the Millwall Dock Authorities is approximately correct and according to present arrangements she is to dock in the Millwall Graving Dock early next week.

We beg, however, to advise you that we have to-day formal notice of requisition from the Director of Transports for this vessel. This makes the ninth vessel of our comparatively small fleet on Govern-

Respondents' Exhibits.

541

ment Service and we sincerely trust that the Admiralty will now see fit to leave the remainder of our Fleet alone as we know of no firm of Tramp Shipowners with the same proportion of vessels on Government service that we have.

We think she is intended for the Mule Service.

Yours faithfully

Sd H. HOGARTH & SONS

P.

Billiter House,
Billiter Street,
London, E. C.

542

April 10th 1915.

Admiralty Dept.

Messrs. H. Hogarth & Sons.
Glasgow.

Dear Sirs,

S. S. *Baron Ogilvy*.

We are in receipt of your favor of yesterday's date.

543

As you imply Messrs Hogg & Robinson have nothing whatever to do with the Department with whom we are dealing.

Messrs. Hogg & Robinson merely act as the City Agents for the Admiralty as regards stores. That is they look after the shipments of hay, Army stores, Navy stores that are required at various places abroad but even for that business at the moment they are not wanting anything very much.

They were pressed a little while ago for tonnage and thinking the London Brokers were not giving them all the help they could they sent a whip round to owners themselves.

We however, keep in close touch with Hogg & Robinson and whenever they have anything good to work upon we let our friends know.

You will now have received a formal telegram from the Admiralty requisitioning this steamer under Royal Proclamation for Government Service.

The Admiralty have also sent us a similar telegram.

As they had not sent this message off last evening when we saw them they could not proceed to discuss the alternative suggestion that we have in hand, but we are seeing them at noon today and will advise you further.

Yours faithfully,

Sgd HARLEY & CO.

Q.

Billiter House,
Billiter Street,
London, E. C.

April 10th 1915.

Admiralty Dept.

Messrs. H. Hogarth & Sons.
Glasgow.

Dear Sirs,

S. G. Baron Ogilvy.

We have now called at the Admiralty and lodged with them a letter as per enclosed copy.

Respondents' Exhibits.

547

They told us they accepted the proposition contained therein and will be writing us formally to-night.

Meantime they told us we could telegraph you that the matter was in order.

They also asked for further tonnage.

NEW ORLEANS @ Avonmouth or Liverpool—mules
—Three or four voyages Montreal or Newport
News @ Avonmouth or Liverpool Horses
£13. 10. 0. Four or five voyages.

Monte Video @ Avonmouth or Liverpool one voyage Horses April/May

548

and if you can propose us further tonnage we shall be glad to hear.

Yours faithfully,

Sgd HARLEY & CO.

R.

10th April 1915

To the Director of Transports.
Admiralty.

Sir,

549

S. S. Baron Ogilvy

Now London Expected Discharged Monday.

We beg to acknowledge receipt of your notice of requisition of this steamer for Government service.

Permit us to say that if it would suit your purpose equally as well to charter her for four trips from New Orleans to Avonmouth or Liverpool for

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8
3

550

Respondents' Exhibits.

the conveyance of mules that owners would be agreeable to undertake that employment (you nevertheless remaining responsible for any third party claims as under requisition) on being paid freight at the rate of £13.10.0 per head of mule put on board plus 10/- gratuity on the number landed alive.

Owners would undertake all fittings, foddering electric light wireless telegraphy, supply attendants etc. in the usual manner as they are doing in the case of their other "Baron" steamers at present under your employment, and they would do their best to carry out all work to your satisfaction.

551

In the event of your agreeing to this proposal the s. s. *Baron Ogilvy* would erect fittings at New Orleans to carry as many mules as possible under the supervision of your Officer there.

An early reply owing to the prompt position of the steamer is requested

Your obedient servants,

Sgd HARLEY & CO.

We estimate this steamer's position would be as under

	1st voyage ready New Orleans about 16th May
	2nd " " " " about 30th June
552	3rd " " " " about 15th August
	4th " " " " about 1st October

S.

Copy Telegram.

12 h 48 London G. 39

Glasgow.

10th April 1915.

Received here at 1.16 p. m.

Hogarth Glasgow.

Baron Ogilvy arranged four mule trips Admiralty also want more steamers namely Monte Video to Avonmouth or Liverpool Horses April May one voyage also from Montreal or States Avonmouth or Liverpool Horses several voyages.

554

EVENHANDED FEN

T.

Copy Telegram.

10th April 1915.

H.M.S.

Admiralty London.

To

Evenhanded Fen Ldn.

555

Your offer *Baron Ogilvy* four voyages conveyance of mules New Orleans to Avonmouth or Liverpool freight £13.10.0 per head gratuity 10/- each animal landed alive is accepted stop please say when and where ship can be inspected.

TRANSPORTS.

U.

Extract.

10th April 1915.

MEESRS Harley & Co.
London.

Dear Sirs.

We have your favours of yesterday's date.

557 "Baron Ogilvy." We note all you write, and would advise you the letter you have sent to the Director of Transports is quite in order. We wired you to-day that we had now received official notice from the Director of Transports that he has been forced to requisition this steamer. We asked you in our wire to make arrangements to have her taken up on the "per head mule" basis, for four trips, as we prefer it to the 11/- Time Charter, and no doubt we will have word from you shortly that this has been arranged. Mr. Hutchison, our Superintendent, is presently in Cardiff attending to "Baron Polwarth," but as she sailed at noon for New Orleans, he leaves at 3 p. m. for London to have "Baron Ogilvy" fitted out with "Wireless" etc. etc., and drydocked. He will no doubt call on you on Monday.

558

* * * * *

Yours faithfully,

Sd. H. HOGARTH & SONS
J. B. H.

V.

Extract.

12th April 1915.

Messrs. Harley & Co.

London.

Dear Sirs,

S. S. Baron Ogilvy.

We are in receipt of your two letters of Saturday 10th instant with copy of your letter of Saturday to the Director of Transports and we note that the proposal therein is duly accepted by the Admiralty. We are accordingly proceeding with the fitting of the vessel for mule business

560

* * * * *

Yours faithfully,

Sd. H. HOGARTH & SONS

J. B. H.

 Copy.

Messrs Harley & Co. to Messrs. H. Hogarth & Sons

12th April, 1915.

Admiralty Dept.

561

Copy of telegram received from the Admiralty:

10th April, 1915.

Your offer *Baron Ogilvy* four voyages conveyance of mules New Orleans to Avonmouth or Liverpool freight £13.10. per head gratuity 10/- each animal landed alive is accepted stop please say when and where ship can be inspected.

W.

Billiter House.
 Billiter Street.
 London, E. C.

April 12th 1915.

Admiralty Dept.
 Messrs. H. Hogarth & Sons.
 Glasgow.

563 Dear Sirs,

Your favours of Saturday's date to hand for which we thank you.

S. S. Baron Ogilvy We note what you write and have now received a telegram from the Admiralty formally confirming this steamer for four voyages for mules.

We enclose you copy of this message.

We sent down to the steamer this morning and hope later on to have a visit from Mr. Hutchinson (Have since seen him).

Meantime as the Admiralty want to inspect the boat we are arranging for them to do so.

S. S. Baron Jedburgh We note what you say, and that she is only taking troops and stores.

564

We will try to find out, if it is at all possible, if there is any probability of this boat being released.

As advised you on Saturday the Admiralty want more steamers:—

New Orleans @ Avonmouth or Liverpool—mules. Four voyages

Montreal or Newport News @ Avonmouth or Liverpool—Horses—Five voyages.

Respondents' Exhibits.

565

Monte Video @ Avonmouth or Liverpool—
Horses—One voyage.

Yours faithfully,

Sgd HARLEY & CO.

—
X.

Extract.

13th April 1915.

566

Messrs Harley & Co.
London.

Admiralty.

Dear Sirs,

.

Baron Ogilvy Thanks for copy of telegram from
the Admiralty formally confirming the arrange-
ment whereby this vessel is to be employed as a
mule carrier.

.

Yours faithfully,

567

Sd. H: HOGARTH & SONS.

Y.

Admiralty
15 April, 1915

Gentlemen :

With reference to your letter of the 10th inst. and in confirmation of my telegram of the same date, I beg to inform you that your tender of the s. s. *Baron Ogilvy* is accepted for the conveyance of 672 mules from New Orleans to Avonmouth or Liverpool for four voyages the first homeward sailing to be about 16th May.

569

The conditions of acceptance are as follows:—

1. The rates agreed are:—

Freight per mule shipped	£13.10.0
Gratuity on each animal landed alive	10.0

2. Conditions to be as at present operative in the case of other vessels belonging to Messrs. Hogarth & Sons engaged in this service.

3. Ship to be fitted at New Orleans fittings to be erected according to Specification T.77 to the satisfaction of the Remount Officer and to be made good between voyages at Owner's cost.

570

4. In carrying out the work of fitting attention must be paid to the following requirements:
"Main deck to be pierced at sides for side scuttles, additional electric lights to be fitted

Respondents' Exhibits.

571

Scuppers permanent fresh water
Service to Mule Decks, with the
necessary tanks, pumps and hoses
and accommodation for Officers,
Foremen and attendants with a room
for gear, pharmacy etc.

VENTILATION Additional ventilation
is required, by fitting side
scuttles, wind scoops and windsails
as necessary. It will also be necessary
to fit exhaust fans to Mule Decks.

I am,

Gentlemen,

572

Your obedient Servant

Sgd E. J. FOLEY
Director of Transports.

Messrs. Harley & Co.
Billiter House,
Billiter Street, E. C.

573

Z.

Billiter House,
Billiter Street,
London, E. C.
Admiralty Dept.

April 16th 1915.

Messrs H. Hogarth & Sons.
Glasgow.

Dear Sirs.

575

S. S. Baron Ogilvy.

Herewith we beg to hand you copy of confirmatory letter regarding this steamer which we have received from the Admiralty.

You will note they have put in 672 mules and we called upon them pointing out that this is incorrect and that steamer is engaged for as many as she can carry under the supervision of the Remount Officer at New Orleans.

To this they quite agreed but they said their Officer has been on board and made a measurement of steamer and has sent the Admiralty a full return.

576 This must be wrong, because when the Admiralty Official went on board he merely made a superficial inspection as to side lights etc. etc. and did not measure steamer up at all.

Anyway the Admiralty are quite satisfied that steamer may carry as many as she can subject to N. Orleans Officer.

They mentioned incidentally today about your other boats carrying so many more mules than was estimated on this side.

Respondents' Exhibits.

577

They did not quite know how it came about, but apparently were satisfied, and we pointed out to them the obvious fact that the mules are being carried splendidly without practically any loss, with which they concurred.

We have given Mr. Hutchison copy of clauses Nos. 2, 3, & 4 in the Admiralty letter.

Yours faithfully,

HARLEY & CO.

578

Respondents' Exhibit C. R. D. 1.

CHARLES ROBERTSON DUNLOP, of 34 Hyde Park Gate, London S.W. Barrister-at-Law, aged 41 years and upwards, doth depose and say as follows:—

I am a member of the English Bar. I was called by the Honourable Society of the Inner Temple on May 1st, 1901, I have a considerable practice in the Commercial and Admiralty Courts and, since the outbreak of the war, in the Prize Court. For over six years I have held the appointment of Standing Counsel to the Lords Commissioners for executing the office of Lord High Admiral of the United Kingdom. I have made a study and have knowledge of the prerogatives and powers of the Crown and Government under English law and particularly as to the power of the Crown and Government to requisition the property of subjects during time of war.

579

The King of the United Kingdom has the right and power in virtue of the Royal Prerogative to requisition any British ship when national emer-

gency exists rendering it necessary to take such ships for preserving or defending national interests. Lord Justice Swinfen Eady in the course of his judgment in the Court of Appeal in *The Broadmayne* (1916) P. 64 at p. 67 said "It is beyond dispute that it is part of the prerogative of the Crown in times of emergency to requisition British ships."

581 Although a very large number of British ships have been requisitioned during the present war by the British Admiralty representing the Crown and in many cases the effect has been to divert the ships from employment more profitable to the Owners or Charterers or to interfere seriously with their business. There is no case, so far as I have been able to trace, in which the right of the crown to requisition has been questioned. If it could have been questioned, I am sure that it would have been.

The right of the Crown to requisition ships was not disputed in *Rex & Hampden* (1637) 3 Howell's State Trials 826. In that case and in the case of *Alexander Bradfoot* in Foster's Crown Cases (1722-60) p. 154 will be found reference to numerous precedents for the seizure or imprisonment of merchant ships into the service of the Crown by virtue of the Royal Prerogative for the defence of the Realm in time of war.

582 According to the Black Book of the Admiralty, folio 28-29 and 157-8 the Admiral might by the ancient laws of England arrest any ship for the King's service. In the *Matter of a Petition of Right* (1915) 3 K.B. 649, Mr. Justice Avory said that the Case of *Rex* and *Hampden* and other authorities established that by the English Constitution the defence of the Realm is entrusted to the Crown that the law has entrusted His Majesty with the care of this defence, and that in this business

of defence the "Supreme potestas" is inherent in His Majesty, and that in times of war the maxim "Salus populi supreme lex" must prevail. In the Courts of Appeal, where the judgment of Mr. Justice Avory was affirmed, Lord Justice Warrington at page 665 said that "it cannot be disputed that the King, as the Supreme Executive Authority, was and is now by virtue of the Prerogative, entitled in circumstances of national emergency to take and use the property of a subject or otherwise interfere with private rights in order to provide for the safety of the public and the defence of the Realm." And at page 666 the learned Lord Justice pointed out that the right was not confined to the doing of what is necessary for the conduct of actual military operations, and that the only condition which must be fulfilled is that the act in question, having regard to existing circumstances, must be necessary for the public safety and the defence of the Realm. As is indicated in the Authorities above referred to and is confirmed in Chitty's prerogative of the Crown at pages 44, 48 and 50, the Common Law of England, having vested in the Kings the right to make war and conduct it, has necessarily and incidentally assigned to him the various prerogatives which may enable him to carry it on with effect. The King may exercise the prerogative through any authorised officer or branch of the Executive Government.

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585

The British Admiralty is an integral part of the Government of Great Britain and Ireland. The Lords Commissioners of the Admiralty are an integral part of the Government of Great Britain and are a branch of the Executive Government, and are authorised and empowered to requisition any British ships on behalf of the Crown. This clearly appears from the terms of the Proclamation

dated the 3rd August, 1914, a copy of which I produce.

587 This Proclamation does not create, limit or extend the right of the Crown to requisition British ships. The right of the Crown exists at Common Law and may be exercised without and independently of any Proclamation. The Proclamation is issued for the convenience and instruction of the public, to make known the fact that a national emergency has arisen, and that the King intends to exercise his prerogative right to requisition ships belonging to his subjects for the purpose of preserving or defending national interests, and also to indicate the manner and the circumstances in which and the terms on which it is intended that the prerogative power shall be exercised

588 No particular form is necessary for the due exercise of the power of requisitioning a British ship. It is sufficient if a Notice is given by a duly authorised official of the Crown to the Owner or Manager of the ship, intimating to him that the ship is required for the use or the service of the Crown. Thus in *The Sarpes* (1916) P 306 a British Tug was requisitioned by means of a telegram from the Admiralty Authorities at a Government Dockyard, requesting the Owners to send their Tugs to the Dockyard. Instances could be multiplied of cases where the requisitioning has been effected without service of any formal official document.

The documents shown to me viz:—a telegram dated 10th April 1917 and letter 15th April 1917, constituted a valid and effective requisitioning of the *S. S. Baron Ogilvy* and was a valid exercise of the King's Prerogative.

As between the Crown and the Owners of the said ship, the effect of the said documents was explained by Lord Justice Pickford in the *Broad-*

mayne (1916) P. at page 73, in the following passages from his Judgment: "It was under the Proclamation of August 3rd 1914, that the ship was requisitioned and that authorised the Lords Commissioners of the Admiralty to requisition and take up for the service of the Crown any British ship for certain service on condition that the Owners should receive payment for their use and for service rendered at an agreed amount, or if there be not an agreed amount, an amount to be settled by a Board of Arbitration appointed by the Crown. It must be taken that she was requisitioned for service of the Crown at a rate of remuneration which would be settled in the future, or if not settled, at a reasonable rate of remuneration. That is really nothing more than a hiring of the ship, and the effect of the requisitioning is that His Majesty has the power to make the owner of the ship come to that hiring agreement. The Owner has no alternative as to whether he will accept the proposition of hiring or not, but the vessel is after all a hired ship. It does not take the property of the ship out of the owner and vest it in the Crown." And at page 75 the learned Lord Justice said that "the rights of the Crown are to have her services during the time she is requisitioned." The passages I have quoted accurately, in my opinion, state the effect of the document requisitioning the steamer in the present case. The Owners when they received the document were bound to put the steamer at the disposal of the Crown and employ her in the service of the Crown.

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The Owners on receiving the Notice of Requisition were bound by law to obey it. If they had disobeyed it they would have been liable to punishment by fine and imprisonment. It would be misdemeanor. In my opinion, the Crown could also

compel the Owners to obey the Notice by obtaining from the Court an Order to that effect. The right to requisition could also be enforced by the Crown by seizing the ship on the high seas or in British territorial waters. It might also be indirectly enforced in a foreign port by instructing the British Consul or other British representative at such port to refuse to give the Master the papers necessary to enable the ship to be cleared from the port. See the case of *The Athanasics* decided in the United States District Court, in which a Greek steamship requisitioned by the Greek Government could not clear from New York without her papers and the Greek Consul who had the papers would not allow her to obtain clearance unless she loaded for the Greek Government.

593

The Statement on oath of the proper officer of the Crown that the ship was urgently required for use in connection with the Defence of the Realm, the prosecution of the war, or any other matters involving national security, ought, as a rule, to be accepted by any Court as conclusive of the fact. See *The Zamora* (1916) 2 A. C. 77, at page 108. As Lord Parker in delivering the Opinion of the Privy Council in that case said. "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.

594

See also the Judgment of Lord Justice Warrington in *Petition of Right* (1915) 3 K. B. at page 666, and of Jessel, Master of the Rolls in *Rawley v Steele* (1877) Law Reports, 6 Chancery Division, at page 527. A Court cannot enquire into the reasonableness or necessity of any act of a

Sovereign done in virtue of his prerogative-powers. As was said by Mr. Justice Story in *The Invincible* 2 Gall. 28 to page 44, in a passage cited with approval by Lord Parker in *The Zamora* "the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign." The Privy Council in *The Zamora* restated the law laid down by Mr Justice Story in *Maisonnaire and Keating* 2 Gall, 324 that "An Act though illegal by International Law, will not on that account be justiciable in the tribunals of another power, at any rate if expressly authorised by order of the Sovereign on whose behalf it is done."

596

As was pointed out by Lord Justice Pickford in *The Broadmayne*, there is no particular magic in the word "requisition". When a ship is requisitioned, her owners are compelled by law to enter into a hiring agreement with the Lords Commissioners of the Admiralty representing the Crown, and the terms of such agreement, if not arranged by the mutual consent of the Admiralty and the owners, have to be arranged by the Admiralty Transport Arbitration Board, which was constituted & appointed by the King for the purpose. The effect of the Notice of Requisition being to compel the owners to enter into an agreement with the Admiralty for the hiring of the ship for Government service, it is immaterial whether the ship is then in a foreign, neutral, or allied port or not. The Notice must be obeyed by the Owners personally. Instances are numerous during the present war of vessels requisitioned by the British or Allied Governments in foreign ports without question or protest from any person. No question has, as far as I am aware, been raised as to the legality or binding effect of a requisition notice served on

597

the Owner or Master of a ship in a foreign port. The facts in *Capel* and *Suledi* 1916. 1 K. B. 439, affirmed by the Court of Appeal (1916) 2 K. B. 365, are illustrative of the point. In that case a Greek ship, whilst under Charter to British Charterers, was requisitioned by the Greek Government by a notice served by the Greek Consul on the Master of a ship when she was in a French port, ordering him to proceed with the ship to Greece. In an action by the Charterers against the Shipowners for alleged breach of Charter, the validity of the Notice was not and could not be questioned. No question can or need arise as to infringement of neutrality if the ship is in a neutral port. The Admiralty, if the Notice of Requisition is obeyed, need not and generally do not take possession of the ship. She usually remains the property and in the possession of her Owners, subject to their legal duty to employ her in the service of the Government. I am not aware of any case in which during the present war the owners of any British ship have refused to obey or comply with a Notice of Requisition, but if a case had arisen and the ship concerned was in a foreign neutral port, there would have been no need for the admiralty to attempt to take possession of the ship in such port. The Admiralty could wait until she left the port and was outside neutral territorial waters. But if they did take possession in a neutral port and if such act constituted an infringement of neutral rights, the objection could only be taken by the Government of the Neutral State and not by Charterers or any private persons whose interests in the ship were affected by the requisitioning. See *The Eliza Ann* I Dods, page 244 and the *Twice Gebroeders* 3, Christopher Robinson, page 162.

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As to the effect of requisitioning on the liability of the ship to be arrested or seized in any legal proceedings in a British or foreign Court, the English law on the subject is clearly stated by the Court of Appeal in the case of *The Broadmayne* already referred to. In that case Lord Justice Swinfen Eady said "It is clear that a ship which is requisitioned by the Crown is as free from arrest as a King's ship of war would be, and the exemption extends as well to claims of Salvage as to claims of collision or other claim. The grounds upon which the exemption exists were fully stated in the Judgment of the Court of Appeal in the case of *The Parlement Be'ge* 8 P. D. 197, 204, 210, where the whole question is discussed".

602

The learned Lord Justice after reading the material passages from the Judgment of Lord Esher, then proceeded to point out that the fact that the effect of requisitioning a ship was not to change the Ownership, "does not prevent a ship so long as she remains under requisition being in the service of the Crown, and as such exempt from process of arrest." Lord Justice Bankes, in delivering Judgment to the same effect, said that the requisition was made under the prerogative of the Crown, and the vessel, while the requisition lasts is "*Publicis usibus destinato*" and as such not liable to the claims or demands of private persons. In *The Constitution* (1879) 4 P. D. 39, Salvage Services were rendered on the English coast to a United States Frigate which had on board a cargo alleged to belong to private individuals, of which the Government of the United States had for public purposes charged itself with the care. The salvors instituted an action in the English Admiralty Court for salvage against the frigate and her cargo, but the Court refused to order a warrant to issue for the

603

arrest of the ship or the cargo, and held it had not jurisdiction to entertain the suit against either the ship or the cargo. See also *The Messicano* 32, T. L. R., page 519. Objection to jurisdiction over a requisitioned or other public ship should, however, be taken by a representative of the Government in whose service the ship is against which proceedings are taken or threatened.

605

In my opinion the effect of the requisitioning of the *Baron Ogilvy* by the British Government was to relieve the Owners of any obligation to perform the Charterparty dated the 6th February 1915, or to pay damages for not performing it, and was to put an end to the Charter Party.

In *Shipton Anderson & Co & Harrison Brothers & Co* (1915) 3 K. B. 676, the owner of a specific parcel of wheat in a warehouse agreed in writing to sell it, but before delivery the wheat was requisitioned by and delivered to the British Government under an Act of Parliament, passed before the date of the Contract, which gave the Government power to requisition the wheat.

606

The Buyers claimed damages for non-delivery, and on their behalf it was contended that as the parties had not stipulated in the contract that the Seller was to be relieved from liability if performance was prevented by the Government the contract was absolute and the Seller was liable to pay damages for not performing it.

Lord Reading, Lord Chief Justice, decided that the Seller was excused on the ground that the contract was subject to an implied condition that if the Government requisitioned the wheat and rendered it impossible for the Seller to perform the contract he should be excused from performance. The principle deduced by Lord Reading from the Authorities was that a party to a contract is ex-

cused from performance or from any liability to pay damages for non-performance if the act to be performed is rendered unlawful or impossible of performance by a lawful Act of State subsequent to the making of the contract.

Mr. Justice Darling agreed with the Judgment of the Lord Chief Justice, and added that "*Salus populi suprema lex*" was a good maxim and that the enforcement of that essential law gives no right of action to whomsoever may be injured by it.

Mr. Justice Lush gave judgment to the same effect and said that the case clearly fell within the principle so often acted upon, that inasmuch as there had been no default on the part of the Vendor, and inasmuch as that which made it impossible for him legally to perform his obligation was an Act of State, it followed that he was excused from performance.

608

Shipton's case and the cases referred to in the Judgment of Lord Reading clearly establish the proposition that when a Charter Party is entered into, which cannot be performed, when the time for performance arrives, if the ship which has to perform the Charter is requisitioned after the date of the Charter, by the Government of the State to which the ship belongs, in the absence of any provision in the Charter to the contrary, the Shipowner is not liable to the Charterers for not performing the Charter Party.

609

When the delay which is caused or is reasonably likely to be caused by the requisitioning of the chartered ship is such as will frustrate the commercial object of the Charter Party, such delay puts an end to the Charter Party. This proposition is clearly established by the decisions of the Court of Appeal in *The "Countess Warwick" v Le Nickel Societe Anonyme* and *The Anglo Northern Trading*

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Respondents' Exhibits.

Company v Emlyn Jones & Williams 22, Commercial Cases, page 194, and the cases therein cited.

C. ROBERTSON DUNLOP

18th January 1918.

Respondents' Exhibit C. R. D. 2.

STATUTORY RULES AND ORDERS, 1914.
No. 1247.

611

DEFENCE OF THE REALM.

Transports and Auxiliaries.

PROCLAMATION, DATED AUGUST 3, 1914, AUTHORIZING THE LORDS COMMISSIONERS OF THE ADMIRALTY TO REQUISITION ANY BRITISH SHIP OR BRITISH VESSEL WITHIN THE BRITISH ISLES OR THE WATERS ADJACENT THERETO.

BY THE KING.

A Proclamation for Authorising the Lords Commissioners of the Admiralty to requisition any
612 British Ship or British Vessel within the British Isles or the Waters adjacent thereto.

George R.I.

Whereas a national emergency exists rendering it necessary to take steps for preserving and defending national interests:

And whereas the measures approved to be taken require the immediate employment of a large number of vessels for use as Transports and as Auxil-

aries for the convenience of the Fleet and for other similar services, but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon:

Now, therefore, We authorize and empower the Lords Commissioners of the Admiralty by warrant under the hand of their Secretary or under the hand of any Flag Officer of Our Royal Navy holding any appointment under the Admiralty to requisition and take up for Our service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such period of time as may be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose.

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Given at Our Court at Buckingham Palace, this Third day of August, in the year of Our Lord One thousand nine hundred and fourteen, and in the Fifth year of Our Reign.

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God save the King.

Respondents' Exhibit C. R. D. 3.*Defence of the Realm (Amendment),*

[5 GEO. 5.] No. 2, Act, 1915 [CH. 37.]

CHAPTER 37.

An Act to amend the Defence of the Realm Consolidation Act, 1914. [16th March 1915.]

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Subsection (3) of section one of the Defence of the Realm Consolidation Act, 1914 (which gives power to take possession and use for the purpose of His Majesty's naval and military services certain factories or workshops or the plant thereof), shall apply to any factory or workshop of whatever sort, or the plant thereof; and that subsection shall be read as if the following paragraphs were added after paragraph (b):—

“(c) to require any work in any factory or workshop to be done in accordance with the directions of the Admiralty or Army Council, given with the object of making the factory or workshop, or the plant or labour therein, as useful as possible for the production of war material; and

“(d) to regulate or restrict the carrying on of work in any factory or workshop, or remove the plant therefrom, with a view to increasing the production of war material in other factories or workshops; and

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"(c) to take possession of any unoccupied premises for the purpose of housing workmen employed in the production, storage, or transport of war material."

(2) It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference.

(3) In this section the expression "war material" includes arms, ammunition, warlike stores and equipment, and everything required for or in connection with the production thereof.

2. This Act may be cited as the Defence of the Realm (Amendment), No. 2, Act, 1915.

Short title

Respondents' Exhibit C. R. D. 4.*Courts (Emergency Powers) Act, 1917.*

[7 & 8 GEO. 5.]

[CH. 25.]

CHAPTER 25.

D. 1917.

An Act to amend the Courts (Emergency Powers) Acts, 1914 to 1916, and the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, and to grant relief in connexion with the present war from liabilities and disqualifications arising out of certain contracts.

[10th July 1917.]

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

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tracts.

1.—(1) Where, upon an application by any party to a contract for the construction of any building or work or for the supply of any materials for any building or work entered into before the fourth day of August, nineteen hundred and fourteen, the court is satisfied that, owing to the prevention or restriction of, or the delay in, the supply or delivery of materials, or the diversion or insufficiency of labour, occasioned by the present war, the contract cannot be enforced according to its terms without serious hardship, the court may, after considering all the circumstances of the case and the position of all the parties to the contract and any offer which may have been made by any party for a variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit.

Respondents' Exhibits.

For the purpose of this subsection where an offer made before the fourth day of August nineteen hundred and fourteen was binding on a contracting party if accepted within a specified period expiring after that date and was so accepted after that date, the contract shall be deemed to have been entered into before that date.

(2) Where, upon an application by any party to any contract whatsoever, the court is satisfied that, owing to any restriction or direction imposed or given by or in pursuance of any enactment relating to the defence of the realm or any regulation made thereunder, or owing to the acquisition or user by or on behalf of the Crown for the purposes of the present war of any ship or other property, any term of the contract cannot be enforced without serious hardship, the court may, after considering the circumstances of the case and the position of the parties to the contract and any offer which may have been made by any party for the variation of the contract, suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit.

This subsection shall apply to any obligation relating to the supply of water, heat, light, traction or power arising under any Act of Parliament, or order having the force of an Act of Parliament, in like manner as it applies to a contract, except that it shall not be lawful for the court to annul any such obligation.

(3) This section shall be construed as one with the Courts (Emergency Powers) Act, 1914. 4 & 5 G

Respondents' Exhibits.

2. Where, by virtue of any contract of tenancy, any person is bound to do or abstain from doing or is under any liability if he abstains from doing or does any act or thing, and by virtue of any enactment relating to the defence of the realm or any regulation made thereunder the doing of such act or thing is wholly or partially restricted or ordered, he shall not, during the continuance of the contract or on or after the termination thereof, be liable to any mandatory order or any injunction or interdict in respect of such act or thing, or be liable to pay any sum of money or incur any forfeiture or other penalty in respect of the failure to do or the doing of such act or thing, if and in so far as the failure to do or the doing of such act or thing is attributable to compliance with such restriction or order as aforesaid:

Provided that the relief afforded by this provision from the obligation to do any such act or thing in consequence of such a restriction as aforesaid shall be subject to the following provisions:—

- (a) If the restriction is removed during the currency of the contract the obligation shall be fulfilled as soon as may be after the restriction is removed;
- (b) If the restriction has not been removed before the termination of the contract the person to whom the relief is given shall be liable to pay as damages a sum not exceeding the expenditure (if any) which would have been entailed by the fulfilment of the obligation.

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Respondents' Exhibits.

3. Where, before or after the passing of this Act, the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order, or restriction of any Government department or of a competent naval or military authority made, issued, given, or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government department with the object of preventing transactions which, in the opinion of the department, would or might be contrary to national interests in connection with the present war, proof of that fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract. A certificate by the appropriate Government department shall be sufficient evidence that such direction or advice was issued or given and with such object as aforesaid.

Relief from liability where fulfilment of contract interfered with by action of Government department.

4.—(1) Subsection (2) of section one of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, shall not apply to a lease of a dwelling-house for a term of twenty-one years or upwards.

Power to accede to premiums on leases for 21 or upwards. 6 & 7 Geo. 5.

(2) Section two of the Courts (Emergency Powers) (No. 2) Act, 1916, is hereby repealed.

5.—(1) Where any sum has, whether before or after the passing of this Act, been paid on account of any rent or mortgage interest, being a sum which by virtue of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, would have been irrecoverable by the landlord or mortgagee, the sum so paid shall at any time within six months after the date of payment, or, in the case of a payment made before the passing of this

Provision as to sums made irrecoverable. 5 & 6 Geo. 5.

Respondents' Exhibits.

Act, within six months after the passing thereof, be recoverable from the landlord or mortgagee who received the payment or his legal personal representative by the tenant or mortgagor by whom it was paid, and may, without prejudice to any other method of recovery, be deducted by such tenant or mortgagor from any rent or interest payable within such six months by him to such landlord or mortgagee.

(2) If any person in any rent book or similar document makes an entry showing or purporting to show any tenant as being in arrear in respect of any sum which by virtue of the said Act is irrecoverable, or if, where any such entry has before the passing of this Act been made by or on behalf of any landlord, the landlord, on being requested by or on behalf of the tenant so to do, refuses or neglects to delete the entry, he shall on summary conviction be liable to a fine not exceeding ten pounds.

(3) This section shall be construed as one with the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915.

6. The provisions of section one, subsection (1) (a) of the Courts (Emergency Powers) Act, 1914, shall not apply to any judgment or order for recovery or payment of any sum of money or costs given or made in any action of tort, or in Scotland in any action of reparation founded on delinquency, whether before or after the commencement of this Act.

7. In subsection (6) of section two of the Increase of Rent and Mortgage Interest (War Re-

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strictions) Act, 1915, which relates to tenancies at less than rack rent, the word "standard" shall be omitted, and at the end of the subsection there shall be inserted the following words "and this Act shall apply in respect of such dwelling house as if no such tenancy existed or had ever existed."

8. The Courts (Emergency Powers) Act, 1914, shall have effect in favour of officers and men of His Majesty's Forces with the following modification (that is to say)—

Application of subsection (1) of section one of 4 & 5 Geo. 5. c. 24 to officers and soldiers.

Subsection (1) of section one shall apply to any sum of money due and payable in pursuance of a contract made before the officer or man has joined His Majesty's Forces.

9.—(1) Whereas by reason of the emergencies of the present war members of the Commons House of Parliament have sometimes been, or may hereafter be, required to supply property to, or to permit the use thereof by, a Government department for purposes connected with the present war, it is hereby declared that none of the provisions of the House of Commons (Disqualification) Act, 1782, or of the House of Commons (Disqualifications) Act, 1801, shall be construed so as to extend to a contract or agreement entered into during the present war as to the price or compensation to be paid for any property so requisitioned or taken or as to any other terms on which any property so requisitioned or taken is to be handed over or supplied.

Relief from disqualification for members of House of Commons in certain cases.

22 Geo. 3. c. 24
41 Geo. 3. c. 24

(2) This section shall not affect any legal proceedings instituted before the twenty-first day of February, nineteen hundred and seventeen.

10. This Act may be cited as the Courts (Emergency Powers) Act, 1917.

Short title.

Respondents' Exhibit C. R. D. 5.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Friday, Dec. 7, 1917.

COMPENSATION FOR REQUISITIONING SHIPS.

CROWN STEAMSHIP COMPANY, LTD. V. LORDS COMMISSIONERS OF THE ADMIRALTY.

Before Lord Justice SWINFEN EADY, Lord Justice WARRINGTON and Lord Justice SCRUTTON.

- 641 This was an appeal by the Admiralty Commissioners from a decision of the King's Bench Divisional Court, affirming Mr. Justice Sankey, who ordered the Admiralty Transport Arbitration Board to state a case upon the question whether the Admiralty were in law liable for damage to the steamship *Crown of Leon* while under requisition.

The judgment of the Divisional Court was reported in *Lloyd's List* on July 3, 1917.

The Solicitor-General (Sir Gordon Hewart, K.C.) and Mr. G. W. Ricketts (instructed by the Treasury Solicitor) appeared for the Lords Commissioners of the Admiralty; and Mr. C. T. Le Quesne (instructed by Messrs. Botterell & Roche) represented the respondents.

- 642 The SOLICITOR-GENERAL explained that the question of whether the Admiralty Transport Arbitration Board could be required to state a case depended on whether (1) there was a submission by them to arbitration, and (2) even if there were such a submission the Admiralty Transport Arbitration Board could be required to state a case, having regard to its constitution and rules.

By proclamation dated Aug. 3, 1914, the Lords Commissioners of the Admiralty were empowered

to requisition and take up for Our service any British ship or vessel as defined in the Merchant Shipping Act, 1894, within the British Isles or waters adjacent thereto for such period of time as may be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use and for services rendered during their employment in Government service and compensation for loss or damage thereby occasioned according to terms arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose.

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By the exercise of the prerogative of the Crown it was possible to requisition ships without payment, but this Proclamation announced that when requisition took place there should be payment.

LORD JUSTICE SWINFEN EADY: Commonly the ship was taken with her crew; in fact, the owners worked her with their crew.

THE SOLICITOR-GENERAL: No doubt when services of that kind are rendered they must be paid for.

LORD JUSTICE SWINFEN EADY: The judgment of MR. JUSTICE BRAY does cover that point. 645

THE SOLICITOR-GENERAL: In the sense of saying there is no prerogative to command services, yes. I was not thinking of that when I said the proclamation contained promise of payment which would otherwise not be made.

LORD JUSTICE SWINFEN EADY: It is one entire amount that has to be settled, including something

that might be commandeered and something that could not be.

The SOLICITOR-GENERAL: I do not think that particular question arises in this case. The effect of the proclamation is that these payments are either to be agreed or, in the absence of agreement, to be determined by this particular Board of Arbitration.

Lord Justice SCRUTTON: It did not seem to me to contemplate that the ship should go on running; and when a loss occurred, that then the compensation should be determined.

The SOLICITOR-GENERAL said the constitution of the Board was fixed by proclamation dated Aug. 31, and under Rule 6 the President might direct that any claim to arbitration should be heard by a tribunal consisting of the President and Vice-President sitting with Arbitrators from the panel selected by the President.

And that such award of any two arbitrators of such tribunal shall be conclusive and not subject to appeal or review.

The purpose of the rules was to make this tribunal, composed as it was of men with special qualifications, a tribunal whose findings should not be open to the ordinary kind of appeal or review.

Lord Justice SWINFEN EADY: That proclamation was addressed to a state of affairs in which it was intended by Government to take up ships for national service, and where these ships were to be worked by owners and their crews, the owners perhaps finding stores and provisions for the crew, the Admiralty finding coal; marine insurance for owners' account; war risk for the account of the Admiralty—terms of that kind which can only be arrived at by arrangement, what jurisdiction would

there be in the Crown by its prerogative to determine the rules by which that was to be settled?

The SOLICITOR-GENERAL: So far as the subject-matter that your Lordship has mentioned includes elements of service, &c., which are not within the prerogative of the Crown, one sees the difficulty.

Lord Justice SWINFEN EADY: These are the matters which this Board of Arbitration has to deal with.

The SOLICITOR-GENERAL: The most familiar topic before that Board is as to hire.

Lord Justice SCRUTTON: Hire and what hire covers.

Lord Justice SWINFEN EADY: When the Crown simply takes the ship there is an end of the matter. But when it is a question of the ship being sailed and stores provided by the owners, and the owners' crew being employed, and the details of the way in which the ship is to be sailed, the question at once arises whether the subject may appeal.

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The SOLICITOR-GENERAL: So far as the mere use of the ship is concerned the Proclamation concedes something to the owners in saying they shall receive payment for that, and that matter goes to the Board of Arbitration.

Lord Justice SWINFEN EADY: Do you say "shall not be subject to appeal or review" prevents it being an arbitration under the Arbitration Act?

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The SOLICITOR-GENERAL: Yes, that was the intention.

Proceeding, the SOLICITOR-GENERAL submitted that an order to state a special case would *pro tanto* review the award.

Lord Justice SWINFEN EADY: Is this a case in which there was no charter and no agreement at all?

The SOLICITOR-GENERAL: Yes.

Lord Justice SWINFEN EADY: Who sailed her?

The SOLICITOR-GENERAL: I think the owners.

Lord Justice SWINFEN EADY: Who provided stores and paid the wages of the crew?

Mr. LE QUESNE: The owners.

Lord Justice SWINFEN EADY: If that is so, is it not outside the powers of requisition? Stating a special case is a very convenient way of dealing with this, and if a contrary view were to obtain it might open a much wider question. Is it worth while pressing this?

The SOLICITOR-GENERAL: Your Lordship has been good enough to give me a clear intimation of the view in your Lordship's mind; and if I may say so, without dwelling on the matter, after what has been said as to the terms of the proclamation I take the responsibility on myself of saying I will not proceed further with the appeal.

Mr. LE QUESNE: I ask your Lordship to give me my costs.

Lord Justice SWINFEN EADY: You do not raise any objection, Mr. Solicitor?

The SOLICITOR-GENERAL: No.

Lord Justice SWINFEN EADY: Then the respondents will have their costs of coming here.

Respondents' Exhibit H. E. R.

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KINGS'S BENCH DIVISION.**COMMERCIAL COURT.***Friday, Feb. 22, 1918.***MAIZE CONTRACT DISPUTE.****A. E. LAWRENCE & CO. V. ELIAS BUERGER & CO.****Before Mr. Justice ATKIN.**

Judgment was delivered in this case to-day.

The previous proceedings were reported in
Lloyd's List on Monday, Feb. 18, 1918.

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Mr. D. C. Leck, K.C., and Mr. H. H. Joy (instructed by Messrs. W. and W. Stocken) appeared for Messrs. Elias Buerger & Co. (the sellers), the appellants; and Mr. R. A. Wright, K.C., and Mr. A. Neilson (instructed by Messrs. W. A. Crump & Son) appeared for Messrs. A. E. Lawrence & Co. (the buyers) the respondents.

The question raised was: What was the position of the sellers under a contract to sell Plate maize, contract made in November, 1916, relative to December-January shipment, in view of the fact that on Jan. 4, while there was yet ample time to carry out the contract, the Royal Commission on Wheat Supplies stepped in with a telegram sent to the Baltic Mercantile & Shipping Exchange and elsewhere, which it was contended prevented the carrying out of the contract?

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The matter went to arbitration, and there was an award stated on a special case.

The award determined that, subject to the opinion of the Court upon the case stated, that the sellers committed a breach of the contract, and that they should pay to the buyers the sum of £620 7s.

for the breach, and should also pay to the buyers their costs of the arbitration.

The appellants contended there was an undoubted interference by the Royal Commission on Wheat Supplies with the fulfilment of the sellers' contract, therefore the finding of the arbitrators was wrong.

JUDGMENT.

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Mr. Justice ATKIN, delivering judgment, said: This dispute comes before me on a case stated by arbitrators arising on a contract made in November, 1916, between the buyers and sellers for the purchase of 250 tons of yellow La Plata maize. The contract was a contract in the form of a London Corn Trades Association contract for La Plata grain. Under the terms of the contract, which were correctly stated in paragraph 3:—

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The 250 tons of maize sold were to be shipped as per Bill or Bills of Lading, to be delivered during December, 1916, and/or January, 1917, and notice of appropriation with ship's name and approximate quantity loaded to be given by the shipper of the grain tendered under the contract to his buyer within 14 days from date of Bill of Lading, and by each other seller within the 14 days, or in due course if received by him after that time; should the shipper's notice be delayed beyond the 14 days through any cause beyond his control, it was to be given within 24 hours from arrival of documents in Europe, and passed on by each other seller to his buyer in due course on receipt.

The position of the seller in this case was that whereas he had a right to deliver the December or

January shipment, he had only covered himself for the December shipment. He had bought November and December shipments. As far as the December shipment is concerned, it has been found by the arbitrators, the latest shipment in December was made at such a date that the last day on which the seller could have performed his contract in respect of the December shipment was on Jan. 4, and he had made no tender on that day, and, therefore, as far as the December shipment was concerned that would have been a default. The case is not affected by the subsequent order, which one has to refer to, dated Jan. 4. In respect of the December shipment the case seems to be entirely covered by Mr. Justice Bailhache, in *Buerger v. Alexander*. But on Jan. 4 a fact occurred which has caused the difficulty in this case. That fact, as set out in paragraph 6 of the case, stated:—

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On Jan. 4, 1917, the Royal Commission on Wheat Supplies sent a telegram to the London Corn Trades Association in the following terms:—

The Food Controller has decided that the Royal Commission on Wheat Supplies shall control the importation of maize for sale in the United Kingdom. Please inform your members that all holdings of maize not yet arrived are taken over at to-day's closing c.i.f. price, and that present holders are free to act as agents of the Royal Commission for re-sale of their holdings on c.i.f. terms at prices fixed from time to time, receiving brokerage of 3d. per quarter. In order to avoid dislocation of trade, holders of maize arriving before further instructions are issued should sell such maize to consumers either c.i.f. to-day's prices as

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agents for the Royal Commission, or may at their own risk sell on credit or delivery terms, charging prices equivalent to c.i.f. prices, with addition for special facilities given and risk incurred. Maize arriving which cannot be sold at the price fixed must be landed for account of the Royal Commission. All holders of maize to arrive are required to furnish the Royal Commission on or before January with full particulars of their holdings—The Wheat Commission, London.

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Thereupon that Order, if it is to be properly called an Order—that telegram was supplemented by another telegram from the Royal Commission, dated Jan. 5, as follows:—

The telegram sent by the Commission yesterday does not apply to holdings of maize already purchased for the United Kingdom on ex ship or delivery terms. The term consumer includes distributing merchant. No dealings in maize options are permitted, except by license of the Commission, to whom all outstanding commitments must be submitted.

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Whether the Royal Commission on Wheat Supplies had ever seen the London Corn Trade Association form of contract for foreign shipments I am sure I do not know, but if they did they certainly made it a little difficult to construe that telegram by using the word holder. But it does not seem to me to be material in this case to decide what is meant by holder. I should have great difficulty in knowing what it meant, because it would appear to me it might possibly mean either the ultimate seller or the ultimate buyer, or the person

who at the time the telegram was issued was in fact in possession of the Bill of Lading, whether the person who at the time the telegram was delivered was in fact the last person who had received notice of appropriation, and it might mean all these or other things. However, that is a problem that I do not think I have got to solve.

The question that arises is whether by reason of that telegram sent by the Royal Commission on Wheat Supplies the seller is excused from performing his contract, because there is no question but that he did not in fact perform it, and it is put in two ways on his behalf. It was said first of all before the arbitrators that he was protected by the terms of the Defence of the Realm Amendment Act, 1915, Section 1, Sub-section 2, and, secondly, it is said that the effect of the telegram was to create a statutory prohibition of further completion of corn contracts, so that the performance became impossible by reason of the operation of the law. The first question I think that it is necessary to consider is the defence under the Defence of the Realm Amendment (No. 2) Act, 1915. That section (Sub-section 2) provides that:—

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It is hereby declared that where the fulfilment by any person of any contract is interfered with by the necessity on behalf of himself or any other person of complying with any requirement, regulation or restriction of the Admiralty or Army Council under the Defence of the Realm Consolidation Act, or this Act, or under any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of non-fulfilment of the contract so far as it is due to that interference.

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That section in terms applies only to the Admiralty or Army Council, and the requirements, regulations or restrictions of the Admiralty or Army Council, and neither the Royal Commission on Wheat Supplies nor the Food Controller are the Admiralty or the Army Council. But it is said the provisions of the section have been extended to the Food Controller. Now that is a matter that will have to be examined. Assuming that it does apply to the Food Controller, the question arises as to whether or not in this case the sellers can be said to have had the fulfilment of the contract interfered with by the necessity on his part of complying with some requirement, regulation or restriction of the Controller, and that involves this, I think, that the requirement of Jan. 4 was a requirement which he was compelled to comply with.

In order to determine that, one has to consider, I think, what is the position of the Food Controller. The Food Controller was appointed under the new Ministers and Secretaries Act, which was passed Dec. 22, 1916, and that provides that for the purpose of economising and maintaining the food supplies of the country during the present war it shall be lawful for his Majesty to appoint a Minister of Food, under the title of Food Controller, to hold office during his Majesty's pleasure. Section 4

It shall be the duty of the Food Controller to regulate the supply and consumption of food in such manner as he thinks best for maintaining a proper supply of food, and take such steps as he thinks best for encouraging the production of food. For these purposes he shall have such powers or duties of a Government Department or authority as his Majesty

may, by Order in Council, transfer to him or authorise him to exercise or perform concurrently with or in consultation with the Government Department or authority concerned, and also such further powers as may be conferred on him by regulations under the Defence of the Realm Consolidation Act, 1914, and regulations may be made under that Act accordingly.

There is a provision in Sec. 11, Sub-sec. 2, which provides for the issue of documents by the Ministry under that Act. It says:

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Every document purporting to be an Order or other instrument issued by a Minister appointed under this Act, and to be sealed with the seal of the Minister authenticated in manner provided by this section, shall be received in evidence, and be deemed to be such order or instrument without further proof unless the contrary is shown.

The position that existed at that time, therefore, was that the Food Controller had been appointed, but these two sections that I have read appear to give the Food Controller no compulsory powers at all. The provision for his powers are to be such powers as are transferred to him, or that he is to be authorised to exercise concurrently with other Departments, but the powers are to be given to him, either by Order in Council, or by Defence of the Realm Regulations, and the powers that were given to the Food Controller are to be found in Regulation 2 A. By the second clause of that regulation it is provided that the Food Controller may by Order require all or any of the persons owning

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or having power to sell or dispose of any article, to place such article at the disposal of the Controller on such terms as he may direct. It also, by sub-clause 3, provides that any Order under this regulation may be made either so as to apply generally, or so as to apply to any special locality, or so as to apply to the supply of any special article, or to any special producer, &c.

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So far as this case is concerned, I think the somewhat remarkable fact is that that regulation was not made until Jan. 10, six days after this telegram from the Royal Commission on Wheat Supplies; and, as far as I know, the Royal Commission have no compulsory powers of any sort or kind. None have been brought to my attention, nor can I find a trace of any such powers in any Statute I know of. I suppose, if there were compulsory powers in the Food Controller, that he might delegate the exercise of them to the Royal Commission on Wheat Supplies. I do not think it necessary to pronounce any decision on that. But, further, in the first place, the power given under the Defence of the Realm Regulation was not in existence on Jan. 4, when this telegram was issued, and, in the second place, the power given by the Defence of the Realm Regulation, if that were relied on to support the control of the maize after Jan. 10, is only a power

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to require persons to dispose of it by order, and in this case it appears to me that no order has ever been made by the Food Controller.

One is perfectly familiar with what is meant by an Order of a Department, and Section 11, Sub-Section 2, obviously contemplates such an Order. Here, to my mind, there has been nothing certainly produced, as far as one can see, in the nature of an Order dealing with maize. Orders have been made from time to time by the Food Controller. In fact

a very large number of Orders have been made, and the first one I know of is an order dealing with beans, peas, and pulse, made on May 16, and provides that persons who own or have power to sell or dispose of such articles shall place them at the disposal of the Food Controller. That is found at page 261 of the Defence of the Realm Manual, along with divers other orders relating to cereals, some of which are well known to his Majesty's subjects at the present moment. So far as maize is concerned, I know of no Order being made at all, and the telegram is a telegram which purports to be an instruction of the Royal Commission on Wheat Supplies.

680

In these circumstances, it appears to me impossible to say that there was any necessity on the part of the seller of the wheat here, within the terms of the Section, to comply with any requirement, regulation or restriction, whether you consider the telegram to be a requirement, regulation, or restriction, of the Food Controller, or consider it to be a requirement, regulation or restriction of the Royal Commission on Wheat Supplies, and that, I think, would dispose of the defence under the Defence of the Realm Amendment Act.

But there is a further difficulty that arises in respect of this defence and it is this: As I have pointed out, the section itself only applies to requirements, regulations, or restrictions of the Admiralty or Army Council, and that is a protection given by Statute. There has been no Statute conferring a similar protection in respect of the requirements, regulations, or restrictions of the Food Controller. But what has been done was this, that an Order in Council was made, dated Feb. 6, 1917, in these terms:

681

Whereas, under Section 4 of the New Ministries Act, 1916, it is provided, among other things that the Food Controller appointed under that Act is to have such powers or duties of any Government Department or Authority, whether conferred by Statute or otherwise, as His Majesty may, by Order in Council, transfer to him authorising him to exercise or perform concurrently with or in consultation with the Government Department or Authority concerned.

683

Now, therefore, it is hereby ordered as follows, first for the purpose of giving the Food Controller concurrent powers under Sub-section 2, Section 1, of the Defence of the Realm Amendment (No. 2) Act, that that enactment shall be read as if the Food Controller were specified therein in addition to the Admiralty or Army Council.

684

I find it extremely difficult to see that Sub-section 2 of Section 1 of the Act confers any powers upon the Admiralty or Army Council. So far from giving them power, it seems to me it is merely a protection of the individual against the exercise by the Admiralty or the Army Council of their powers, and the protection does not appear to me to add one whit to the powers that were possessed before that Section was passed. So in the same way it seems to me impossible to say that a Section which gives protection to an individual who complies with an order or requirement of the Food Controller can be said in any way to add to the powers of the Food Controller.

Supposing this Order in Council had been passed before Jan. 10, before the Defence of the Realm Regulation I have read. What possible powers of

the Food Controller could have been said to exist in pursuance of this Section as transferred to him under the Order in Council? Therefore, though it is not necessary, I think, in view of the conclusion that I have come to as to the powers actually possessed at that time, to come to a definite conclusion about it, I have the gravest doubt as to whether that Order in Council had any validity whatever by way of giving any protection against an act or requirement of the Food Controller.

Therefore, it appears to me, for the reasons I have given, that the seller in this case cannot avail himself of the defence under the Defence of the Realm Amendment Act. But that Act, in fact, no longer controls the acts of the executive, and the protection given to the public when they comply with the acts of the executive, because it was extended very largely by the Courts (Emergency Powers) Act, 1917, by Section 3. That act was passed in July, 1917, at a period, I think I am right in saying, intervening between the hearing of this case by the arbitrators and their final award.

686

That Act provides that—

Where before or after the passing of this Act the non-fulfilment of any contract (not being a contract of tenancy) was or is due to the compliance on the part of any person with any requirement, regulation, order or restriction of any Government Department, or of a competent Naval or Military Authority, made, issued, given or imposed for purposes connected with the present war, or with any direction or advice issued or given by any Government Department with the object of preventing transactions which in the opinion of the Depart-

687

ment, would or might be contrary to national interests in connection with the present war, proof of the fact shall be a good defence to any action or proceeding in respect of the non-fulfilment of the contract. A certificate by the appropriate Government Department shall be sufficient evidence that such direction or advice was issued or given, and with such object as aforesaid.

That seems to me to have, as I had occasion to say in another case yesterday, a very wide operation. I think it is plain that non-fulfilment due to compliance on the part of any person means where the person is sued by another person. That is only following out the effect of the previous sections of the Defence of the Realm Act, and the word compliance is carefully chosen, and the idea of the necessity of complying with, as in the previous Act, is deliberately excluded. So that it is now no longer necessary to show that it was necessary to comply with an order. That appears because of the use of the words "direction or advice."

In these circumstances, I am inclined to think there would be protection, even though the Government Department in question had no legal authority, in fact, for issuing this requirement, regulation or restriction. I do not think it necessary to go so far as to decide that matter in this particular case, because it appears to me, at present, that, in spite of what I have said on the first head, the order given by the Royal Commission on Wheat Supplies apparently at the request of the Food Controller, would be a sufficient requirement of a Government Department or direction or advice of a Government Department within the terms of that Section 3.

Therefore, it appears to me that, if the seller can bring himself within the terms of that Section, he would be protected. Whether that point was raised or not is not clear, but I think it is reasonably clear from what I was told—that the point of this section was not, in fact, put before the arbitrators, though the Act of Parliament had been passed before they gave their award. Nevertheless, I think if it had been necessary I should probably have remitted the case to the arbitrators to consider the matter, because I do not think that in a case of this kind the decision ought to turn upon the mere fact that an Act of Parliament in fact in operation had not been brought to the attention of the arbitrators. Therefore, one must consider, I think, the bearing of this Section on the case.

692

Now, in order to deal with that matter, one has to consider what the facts are as found by the arbitrators, and, as I understand, what the arbitrators have found is, that the non-fulfilment of the contract was not due to the Order of the Wheat Commission. They say, in Clause 7 of their award:

The Order of the Food Controller of Jan. 4, 1917, created a position which rendered the performance of the contract by the sellers very difficult, but we are not satisfied that such difficulty made the performance of the contract impossible, or that its fulfilment was interfered with, or its non-fulfilment was due to the necessity for complying with such Order within the Defence of the Realm (Amendment) (No. 2) Act, 1915. Section one (2).

693

I have come to the conclusion that this non-fulfilment of the contract was not due to the necessity of complying with this order. Two sets of facts have been brought up. The first, whether it could

be said, merely because there was a requisition, that the requisition prevented the performance of this contract by the sellers; that is one possible view. The other possible view is that, in the absence of the requisition, the sellers could have fulfilled their contract, but, on the other hand, under the requisition they could have obtained the goods, and so they were not prevented by the requisition. But, whichever view is intended to be found, it would, of course, be fatal to the sellers' case, and it appears to me that it is a question of fact, and, on a finding of fact, this Court cannot interfere. The parties have chosen their own tribunal on a question of fact; they have appealed unto Cæsar, and they must be bound by Cæsar's decision, and there is no ultimate Court of Appeal on a question of fact.

Therefore, although very cogent arguments were addressed to me, suggesting that the findings of fact is difficult to explain, arguments to which I have been disposed to give a certain amount of assent, yet it cannot be said, I think, that on the materials before me there was no evidence upon which the tribunal could have found these facts. There is no doubt that they were in the possession of information dealing with this class of business, and their view on a question of fact, unless it is shown there was no evidence to support it, must prevail. Therefore it appears to me that the arbitrators have found a set of facts which would prevent the sellers from having the protection of this Section 3 of the Courts (Emergency Powers) Act, 1917, and, of course, *a fortiori*, assuming that they were in any way entitled to the protection of the Defence of the Realm (Amendment) Act, the finding of fact would equally dispose of the protection under that Section. That being so, it appears to me the defence

founded on these protecting Sections fails, and, in view of what I have said, it appears to me to be unnecessary to further discuss the suggestion that the contract became impossible because it became illegal to perform it.

In my view, there has been at no time a valid Order by the Food Controller in the sense that it was compulsory upon persons to whom it was addressed to comply with it. One feels a difficulty in seeing how, if there was a valid Order, the contract could legally be performed. It would be necessary, no doubt, to define the meaning of holder, but if holder means Bill of Lading holder it is difficult to see how the contracts contemplated in this class of business could be completed, and how the appropriations they are contemplating could be carried out.

For the reasons I have given, it appears to me there was no illegality, the question of illegality cannot arise, and the result is that the sellers have no defence on the findings of the tribunal, and the award must stand, and the sellers must pay the costs of the hearing.

700

Opinion.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

TEXAS COMPANY

vs.

HOGARTH SHIPPING COMPANY,
LTD., and HUGH HOGARTH &
SONS.

Adm. 59—197.

701

MEMORANDUM.

Reflection on this very interesting case, has led to the belief that it very fairly presents a question not peculiar to the admiralty, nor logically depending for existence on a state of war,—although war presents the problem in an acute way, and one attracting more general attention than is commonly given to the events of peace.

That question is, was the performance of the contract for the breach of which this action is brought,—prevented by the impossibility of performing it,—within the modern meaning of that phrase.

702 Much discussion has been had concerning the efficacy of the certificate of the British Ambassador,—I do not now think it necessary to place judgment on any resolution of that query, and by some findings of fact will now show why,—and also reduce the case to the query of legal impossibility, by which phrase I mean an impossibility recognized by law as dissolving a contract.

The parties executed a charter party, containing no “restraint of Princes” clause,—and (as I con-

strue the document) no other clause or rider thereof authorized either party to invoke the line of decisions construing and enforcing that phrase.

The charter named no special ship as the subject of hire for the voyage agreed upon; that was the only matter therein left open, but the moment the ship owners named the *Baron Ogilvy* as the vessel to perform that agreement, the charter became an ordinary voyage charter for that vessel and none other. She was for all legal purposes the ship and the only ship that would perform that particular agreement.

Whether there was what libellants call a "valid requisition" by the British Crown or not, is immaterial, in the sense that the point is not controlling. If I accept the certificate of the Ambassador, of course there was,—but I avoid without decision that question, now before higher authority in the *Glenedin*,—and hold on the evidence that the British government took and used the *Baron Ogilvy*, at and during the very time when the respondents had agreed to devote her to libellant's service, and further that such use was *in invitum*, except in the sense that all British ship owners were I presume patriotically willing to have their vessels used for warlike purposes,—if and when no other man's ship was available.

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In point of fact respondents did not cause or contribute to the taking over by Government of the *Ogilvy*, probably it was no great surprise, but libellant was equally aware at and after charter date of the possibility of requisition.

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As matter of law, respondents were not bound to use effort to prevent requisition, *i. e.*, to shift the burden to some other ship owners' shoulders in the interest of either themselves or libellants; and it was entirely within their right to seek (when gov-

ernmental rise was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more.

Finally, respondents were under no legal obligation to substitute another vessel for the *Ogilvy*, any more than they were bound to make a new charter with libellants. Legally the two propositions are identical.

Thus the question for decision comes to this,—if the means and the only means whereby an American contract can be performed, is taken away by a foreign government, so that performance becomes physically impossible, is the contract dissolved,—so that losses or damages resulting from non-performance lie where they fell in the first instance.

This is a large query,—but some of the elements stated are still immaterial or irrelevant. The fact that the interfering action was governmental and foreign, has been the groundwork or moving cause of libellant's action. That is, reliance is placed on decisions holding that foreign governmental *vis major* preventing performance does not excuse. No decision binding on this court goes so far as to state the rule as above argued for. Whether the English cases touching on the matter can be reconciled, I more than doubt, but am not much concerned with: but neither *Liverpool &c. Co. v. Phenix*, 129 U. S., 397, nor *The Ada*, 250 F. R., 400, decided more than that one who in this country made a lawful contract, not in accord with the law of his own country, could not plead the foreign law to prevent his paying damages.

That is a very different thing from destroying (in a very real sense) the subject-matter of agreement. If it be true, as I believe it to be, that for the purposes of this suit, the *Ogilvy* was or became non-

existent, then the governmental element becomes as unimportant as the foreign, also the absence of the "restraint" clause, and the question is really reduced to its lowest terms; viz.: whether the facts present a case of that "impossibility of performance" which is and long has been a recognized and growing reason for dissolving a contract.

That "ordinarily" impossibility is no defence has been said often enough. It was a common law rule, and is consonant with the often referred to "unmorality" of our immemorial custom. For lawyers purposes it practically rests on *Paradine v. Jayne*, Aleyn, 26,—for a modern application in *Rowe v. Peabody*, 207 Mass., 226.

710

But the defence is equitable, at least in a broad sense, and as equitable defences have made their way at law, so the doctrine of impossibility has advanced.

Wars, and the demands and destructions of war, do not change the law in one sense, but in another they do, by multiplying and enforcing circumstances showing the need of change,—of modernization.

Without war, there had come to be recognized (*inter alia*) two well known grounds of dissolution by impossibility,—destruction of subject-matter without any one's fault, and failure of contemplated means of performance. Under these heads the Great War has only furnished innumerable instances and applications. I think this litigation is one of them.

711

For tracing through multiplied decisions, and attempting to recognize and display the dominant lines of argument, I have no time—nor is that sort of thing useful in a court of first instance.

Respondent's brief consists frankly in Mr. Mackinnon's pamphlet "Effect of War on Contract";

with its reasoning I agree,—though (as above indicated) it seems to me more philosophical to regard the matter as a growth of equity,—humanizing the common law.

In admiralty we may recognize and enforce equitable principles without the strain that is often amusingly evident on the law side.

The matter is one that has attracted comment for years in legal periodicals; reference to the volumes of *The Harvard Law Review* below noted* will give a key to the modern American cases.

713 Of destruction of subject-matter *Martin Emmerich & Co. v. Siegel*, 237 Ill., 610, is a good example, and of failure of contemplated means *Clarksville &c. Co. v. Harriman*, 68 N. H., 374.

The phrase “frustration of venture” has obtained much vogue of late, and *The Allan Wilde* (U. S. S. C., Jan. 13, 1918), will increase it. To me it seems only an equivalent for and no improvement on, “impossibility of performance,” using impossibility in the practical sense so well illustrated by Maule, *J.*, when he pointed out that a shilling *might* be retrieved from deep water, yet legally it was “impossible” to do it,—because no sensible man would attempt the foolish job.

Libel dismissed, with costs.

714 Feb. 3, 1919.

C. M. HOUGH,
U. S. C. J.

Endorsed: Opinion.
Filed Feb. 3, 1919.

* Vols. 14, p. 464; 15, pp. 63 and 418; 19, p. 462, and 12, p. 501.

Final Decree.

715

At a Stated Term of the United States District Court for the Southern District of New York, held at the Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 21 day of February, 1919.

Present :

HON. CHARLES M. HOUGH,
Circuit Judge.

THE TEXAS COMPANY,
Libelant,
against

HOGARTH SHIPPING CO., LTD.,
owner of steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS,

Respondents.

Final Decree.

716

The above-entitled cause having come on to be heard on the pleadings and proofs adduced by the respective parties, and the British Embassy having intervened by counsel as *amici curiae*, and through leave of Court having filed a certificate and suggestion herein, avowing the requisition of said steamship *Baron Ogilvy* by the British Government, as a governmental act of said Government, and the cause having been fully argued by counsel for the respective parties and the certificate and suggestion of the British Embassy having been supported by arguments of its counsel, and due deliberation hav-

717

ing been had and the Court having rendered and filed its decision in writing in favor of the respondents, directing that the libel herein be dismissed, with costs, and the costs of the respondents having been duly taxed in the sum of \$515.02.

Now, on motion of Kirlin, Woolsey & Hickox, proctors for the respondents, it is hereby

ORDERED, ADJUDGED AND DECREED

1. That the libel herein be and it hereby is dismissed on the merits, with costs to the respondents as against the libelant, and

719

2. That the respondents Hogarth Shipping Company, Ltd., and Hugh Hogarth & Sons have, receive and recover of and from the libelant, The Texas Company, and its stipulators for costs, the sum of \$515.02, the costs of said respondents as taxed herein, with interest thereon until paid; and it is further

ORDERED that unless this decree shall be satisfied or proceedings thereon be stayed by appeal within ten days after service of notice of the entry thereof upon the libelant or its proctors, the stipulators for costs on behalf of the libelant shall cause their stipulations to be performed or show cause within four days thereafter, or on the first day of jurisdiction afterwards, why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

720

C. M. HOUGH,
C. J.

Endorsed: Final Decree: filed Feb. 21, 1919.

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING COMPANY, } 59—197.
LTD., owner of the steamship
Baron Ogilvy, and HUGH
HOGARTH & SONS, }
Respondents.

722

Sirs:

PLEASE TAKE NOTICE that the libelant herein, The Texas Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in this action in the office of the clerk of the above-entitled court on or about the 21st day of February, 1919, and from each and every part of said decree.

723

Dated, New York, July 11th, 1919.

HAIGHT, SANDFORD & SMITH,
Proctors for Libelant-Appellant,
27 William Street,
Borough of Manhattan,
City of New York.

To:

ALEXANDER GILCHRIST, Esq.,
 Clerk of the United States District
 Court for the Southern District of New York.

KIRLIN, WOOLSEY & HICKOX, Esqs.,
 Proctors for Respondents,
 27 William Street,
 Borough of Manhattan,
 New York City.

725 FREDERIC R. COUDERT, Esq.,
 HOWARD THAYER KINGSBURY, Esq.,
 Amici Curiae, Counsel for the British Embassy,
 2 Rector Street,
 Borough of Manhattan,
 New York City.

Endorsed: Notice of Appeal: filed July 11, 1919.

Assignment of Errors.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

<hr/> <p>THE TEXAS COMPANY, Libelant,</p> <p>against</p> <p>HOGARTH SHIPPING CO., LTD., owner of <i>S. S. Baron Ogilvy</i>, and HUGH HOGARTH & SONS, Respondents.</p> <hr/>	<p>Assignment of Errors.</p>
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The libelant-appellant, The Texas Company, hereby assigns error in the findings, decision and decree of the District Court herein as follows:

FIRST: The Court erred in finding that the question whether there was a valid requisition of the steamship *Baron Ogilvy* by the British Crown or not was immaterial.

SECOND: The Court erred in failing to find that no valid requisition of the steamship *Baron Ogilvy* was made by the British Government.

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THIRD: The Court erred in failing to find that a taking of the steamship *Baron Ogilvy* by the British Government otherwise than by a valid requisition would not excuse respondent Hogarth Shipping Company, Ltd., from performing the charter with the libelant.

FOURTH: The Court erred in finding on the evidence that the British Government took and used

the steamship *Baron Ogilvy*, in invitum, at and during the very time when the respondent Hogarth Shipping Company, Ltd., had agreed to devote her to libellant's service.

FIFTH: The Court erred in finding that the respondent Hogarth Shipping Company, Ltd., did not cause or contribute to the taking over by the British Government of the steamship *Baron Ogilvy*.

SIXTH: The Court erred in finding that the respondent Hogarth Shipping Company, Ltd., was not bound to use effort to prevent requisition.

SEVENTH: The Court erred in failing to find that the respondent Hogarth Shipping Company, Ltd., should have made effort to obtain release of the steamship *Baron Ogilvy* from her use by the British Government.

EIGHTH: The Court erred in finding that it was entirely within the rights of the respondent Hogarth Shipping Company, Ltd., to seek a charter for the carriage of mules if such charter promised less loss to the respondent than other probable freight.

NINTH: The Court erred in failing to find that the respondent Hogarth Shipping Company, Ltd., should have used effort to bring about the shortest possible period of requisition or "talking" to the end that the steamship *Baron Ogilvy* might be tendered to the libellant on or before May 15, 1915, or otherwise in accordance with the charter with the libellant.

TENTH: The Court erred in failing to find that it was the voluntary modification of the situation

brought about by the offer of the respondent Hogarth Shipping Company, Ltd., or its agents, to the British Government of the mule charter, that prevented the performance of the charter with the libellant.

ELEVENTH: The Court erred in failing to find that the respondent Hogarth Shipping Company, Ltd., should have tendered the steamship *Baron Ogilvy* to the libellant at the expiration of the period of requisition or "taking."

TWELFTH: The Court erred in finding that upon the naming of the steamship *Baron Ogilvy*, the charter became an ordinary voyage charter for that vessel, and none other, and that she was for all legal purposes the ship, and the only ship that would perform the charter. 734

THIRTEENTH: The Court erred in finding that respondent Hogarth Shipping Company, Ltd., was under no legal obligation to substitute another vessel for the steamship *Baron Ogilvy* upon her requisition or "taking" by the British Government.

FOURTEENTH: The Court erred in failing to find that respondent Hogarth Shipping Company, Ltd., was under a legal obligation to nominate and declare another vessel in place of the steamship *Baron Ogilvy* upon her requisition or "taking" by the British Government. 735

FIFTEENTH: The Court erred in failing to find that the requisition or "taking" of the steamship *Baron Ogilvy* was acquiesced in by the respondent Hogarth Shipping Company, Ltd., or its agents, and no appropriate effort was made to perform the charter with the libellant.

SIXTEENTH: The Court erred in finding that the absence of a Restraint of Princes clause in the charter was immaterial.

SEVENTEENTH: The Court erred in failing to find that in the absence of a Restraint of Princes clause in the charter no governmental act or restraint by Great Britain would relieve respondent Hogarth Shipping Company, Ltd., from its charter with the libellant.

EIGHTEENTH: The Court erred in finding that in the absence of a Restraint of Princes clause in the charter the taking of the steamship *Baron Ogilvy* by the British Government in the manner shown by the evidence excused the respondent Hogarth Shipping Company, Ltd., from performing the charter with the libellant.

NINETEENTH: The Court erred in finding that an interfering action which was governmental and foreign relieved the respondent Hogarth Shipping Company, Ltd., from its American contract with an American citizen.

TWENTIETH: The Court erred in finding that the fact that the interfering action was governmental was immaterial.

TWENTY-FIRST: The Court erred in finding that the fact that the interfering action was foreign was immaterial.

TWENTY-SECOND: The Court erred in failing to find that the interfering action by the British Government was foreign.

TWENTY-THIRD: The Court erred in failing to find that a contract created by United States law can be released only by United States law.

TWENTY-FOURTH: The Court erred in finding that for the purposes of this suit upon the requisition or "taking" of the steamship *Baron Ogilvy* by the British Government, that vessel became non-existent.

TWENTY-FIFTH: The Court erred in finding that the charter of the respondent Hogarth Shipping Company, Ltd., to the libelant became impossible of performance.

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TWENTY-SIXTH: The Court erred in finding that the charter of the respondent Hogarth Shipping Company, Ltd., with the libelant was rendered impossible of performance in such a sense as to dissolve the charter.

TWENTY-SEVENTH: The Court erred in finding that the taking of the steamship *Baron Ogilvy* by the British Government in the manner shown by the evidence excused respondent Hogarth Shipping Company, Ltd., from performing the charter with the libelant.

TWENTY-EIGHTH: The Court erred in allowing Frederic R. Coudert, Esq., and Howard Thayer Kingsbury, Esq., to intervene as *amici curiae*, and in receiving the suggestion presented by them on behalf of the British Embassy at Washington.

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TWENTY-NINTH: The Court erred in receiving in evidence the Certificate signed by Colville Barclay, British Charge d'Affaires, attached to the Suggestion aforementioned.

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Assignment of Errors.

THIRTIETH: The Court erred in entering a decree dismissing the libel as against the respondent Hogarth Shipping Company, Ltd.

THIRTY-FIRST: The Court erred in failing to enter a decree in favor of the libelant against the respondent Hogarth Shipping Company, Ltd.

Dated, New York, July 11th, 1919.

HAIGHT, SANDFORD & SMITH,
Proctors for Libelant-Appellant,
27 William Street,
New York City.

743

Endorsed: Assignment of Errors filed July 11,
1919.

744

Order re Exhibits.

745

**UNITED STATES CIRCUIT COURT OF
APPEALS****FOR THE SECOND CIRCUIT.**

THE TEXAS COMPANY,
Libelant-Appellant,
against

HOGARTH SHIPPING CO., LTD.,
Owner of the S/S *Baron
Ogilvy*, and HUGH HOGARTH
& SONS,
Respondents-Appellees.

Order.

746

Upon the annexed consent of the proctors for the respective parties, and upon motion of Haight, Sandford & Smith, proctors for the appellant herein, it is

ORDERED that upon the appeal to this court in the above-entitled cause libelant's Exhibit 1 be omitted from the printed transcript of record, and that the respondents' Exhibit C. R. D. 5 be omitted from the printed transcript of record, except the opinion on page 5 thereof in the case entitled "Crown Steamship Company Ltd. v. Lords Commissioners of the Admiralty"; and that respondents' Exhibit H. E. R. be omitted from the printed transcript of record, except the opinion on page 5 *et seq.* thereof in the case entitled "A. E. Lawrence & Co. v. Elias Buerger & Co.," and it is further

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Order re Exhibits.

ORDERED that three copies of all Exhibits which counsel intend to refer to on the argument be furnished to the court upon the argument.

Dated, New York, August 19, 1919.

H. G. WARD,
U. S. C. J.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Respondents-Appellees.

HAIGHT, SANDFORD & SMITH,
Proctors for Libelant-Appellant.

749

No objection,

FREDERIC R. COUDERT.
HOWARD THAYER KINGSBURY,
Amici Curiae.

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Stipulation.

751

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING CO., LTD.,
owner of *S. S. Baron Ogilvy*,
and HUGH HOGARTH & SONS,
Respondents.

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IT IS HEREBY STIPULATED AND AGREED by and between the parties herein that the foregoing printed copy of the record on appeal is a true transcript of the record as agreed on by the parties herein, and may be certified by the Clerk of this Court and filed in the office of the Clerk of the Circuit Court of Appeals.

Dated, New York, *January 27th, 1920.*

HAIGHT, SANDFORD & SMITH,
Proctors for Libelant-Appellant.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Respondents-Appellees. 753

Approved.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Amici Curiae, Counsel for the
British Embassy.

754

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE TEXAS COMPANY,
Libelant,

against

HOGARTH SHIPPING CO., LTD.,
owner of *S. S. Baron Ogilvy*,
and HUGH HOGARTH & SONS,
Respondents.

755

I, ALEXANDER GILCHRIST, JR., Clerk of the United States District Court for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled cause as agreed on by the parties herein made up pursuant to Rule No. 4 in Admiralty of the United States Circuit Court of Appeals for the Second Circuit.

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IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereto affixed in the City of New York and the Southern District of New York, this *4th* day of *February* in the year *1904* of our Lord, one thousand nine hundred and ~~nine~~ *ten*, and of the Independence of the United States, the one hundred and forty-fourth.

ALEXANDER GILCHRIST, JR.,

Clerk.

(Seal)

United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS COMPANY, Libellant-Appellant,
against

HOGARTH SHIPPING COMPANY, LTD., Owner of the Steamship
Baron Ogilvy, and Hugh Hogarth & Sons, Respondents-Appel-
lees.

Before Ward, Rogers, and Manton, Circuit Judges.

Haight, Sandford & Smith, for Libellant-Appellant.

John W. Griffin, of Counsel.

Kirlin, Woolsey, Campbell, Hickox & Keating, for Appellees.

John M. Woolsey and Harrison Lillibridge, of Counsel.

Frederick R. Coudert and Howard Thayer Kingsbury, *Amici
Curiae*, Counsel for the British Embassy.

Per Curiam:

Decree affirmed.

At a Stated Term of the United States Circuit Court of Appeals in
and for the Second Circuit, Held at the Court Rooms, in the Post
Office Building, in the City of New York, on the 28th Day of
June, One Thousand Nine Hundred and Twenty.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon.
Martin T. Manton, Circuit Judges.

TEXAS COMPANY. Libellant-Appellant,

v.

HOGARTH SHIPPING COMPANY, LTD., and HUGH HOGARTH & SONS,
Respondents-Appellees.

Appeal from the District Court of the United States for the Southern
District of New York.

This cause came on to be heard on the transcript of record from
the District Court of the United States, for the Southern District of
New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and
decreed that the decree of said District Court be and it hereby is
affirmed with costs.

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It is further ordered that a Mandate issue to the said District Court
in accordance with this decree.

Endorsed: United States Circuit Court of Appeals, Second Circuit.
 Texas Co. v. Hogarth Shipping Co. Order for Mandate. United
 States Circuit Court of Appeals, Second Circuit. Filed Jun. 28,
 1920. William Parkin, Clerk.

UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 256 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Texas Company, against Hogarth Shipping Company, Ltd., & ano, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 19th day of July in the year of our Lord One Thousand Nine Hundred and Twenty and of the Independence of the said United States the One Hundred and Forty-fifth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Texas Company is appellant, and Hogarth Shipping Company, Limited, Owner of the Steamship Baron Ogilvy, and Hugh Hogarth & Sons are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,912. Supreme Court of the United States, October Term, 1920. No. 555. The Texas Company vs. Hogarth Shipping Corporation, Owner, etc., et al. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 3, 1920. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS COMPANY, Libelant, Petitioner,
against

HOGARTH SHIPPING CORPORATION, LTD., Owner of the Steamship Baron Ogilvy, and HUGH HOGARTH & SONS, Respondents.

It is hereby stipulated and consented that the certified transcript of the record now on file in the office of the Clerk of the Supreme Court of the United States shall be taken as the return of the Clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari herein.

Dated at New York City, October 28th, 1920.

(Sgd.) HAIGHT, SANDFORD, SMITH &
 GRIFFIN,
By JOHN W. GRIFFIN,
 Proctors for Libelant, Petitioner.
(Sgd.) KIRLIN, WOOLSEY, CAMPBELL,
 HICKOX & KEATING,
By JOHN W. WOOLSEY,
 Proctors for Respondents.

[Endorsed:] U. S. Circuit Ct. of Appeals for the Second Circuit. The Texas Company, Libelant, Petitioner, against Hogarth Shipping Corp., Ltd., owner of the s/s Baron Ogilvy, and Hugh Hogarth & Sons, Respondents. Stipulation. Haight, Sandford, Smith & Griffin, Proctors for Libelant-Petitioner, 27 William Street, Borough of Manhattan, New York City.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, November 3, 1920.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court of
Appeals for the Second Circuit.*

[Endorsed:] 555/27,912. United States Circuit Court of Appeals, Second Circuit. Texas Company v. Hogarth Shipping Co. Return to Certiorari. 1.70.

[Endorsed:] File No. 27,912. Supreme Court U. S., October Term, 1920. Term No. 555. The Texas Company, petitioner, vs. Hogarth Shipping Corporation, Owner, etc., et al. Writ of certiorari and return. Filed Nov. 5, 1920.

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